United States General Accounting Office

GAO

Report to the Chairman, Subcommittee on Federal Services, Post Office, and Civil Service, Committee on Governmental Affairs, U.S. Senate

March 1990

ADP BID PROTESTS

Better Disclosure and Accountability of Settlements Needed

GAO/GGD-90-13

GAO
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General Government Division

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The Honorable David Pryor
Chairman, Subcommittee on Federal
Services, Post Office, and Civil Service
Committee on Governmental Affairs
United States Senate

Dear Mr. Chairman:

In response to your request, we reviewed the bid protest procedures established by the Competition in Contracting Act of 1984 for automated data processing (ADP) procurements.

This report provides information and analysis to answer specific questions you had and to respond to assertions made in several press reports that agencies have paid ADP bid protesters money in exchange for the withdrawal of their protests. This report recommends amending the Competition in Contracting Act of 1984.

We are sending copies of this report to interested congressional committees, the Director of the Office of Management and Budget, the Administrator of the General Services Administration, and other interested parties.

Please contact me on 275-8676 if you or your staff have any questions concerning this report. Other major contributors are listed in appendix V.

Sincerely yours,

L. Nye Stevens

L. Nye Stevens
Director, Government Business
Operations Issues

Executive Summary

Purpose

GAO reported in June 1988 that the Bureau of the Census settled a bid protest on an $80 million computer procurement by paying three bidders $1.1 million primarily because the Bureau believed it could not afford the time required to resolve the protest. Several news organizations reported this and other protests of automated data processing (ADP) procurements, suggesting that the government's ADP bid protest process had gone awry.

The Chairman, Subcommittee on Federal Services, Post Office and Civil Service, Senate Committee on Governmental Affairs, asked GAO to review the bid protest procedures on ADP procurement established by the Competition in Contracting Act of 1984. At the Chairman's request, GAO reviewed all ADP protests filed during the last half of fiscal year 1988 to determine their outcome and the validity of the assertions that

- computer companies are flooding the government with protests,
- some companies routinely lodge protests, and
- agencies would rather settle protests than contest them, by paying protesters money to withdraw, a practice called "Fedmail." (See p. 8.)

Background

During the course of a federal procurement, vendors may assert agency failure to follow procurement laws and regulations by filing a "bid protest." Dissatisfied vendors have traditionally been able to protest procurement actions either to the procuring agency itself, GAO, or, since 1970, certain federal courts. The act added as another forum the General Services Administration Board of Contract Appeals, just for ADP protests. The act generally requires that a protested procurement be suspended until the protest is decided unless "urgent and compelling" circumstances exist that significantly affect U.S. interests and do not permit awaiting a decision. (See pp. 8 to 12.)

Results in Brief

Computer companies were not flooding the government with bid protests and no company routinely lodged protests during the period of GAO's review. Agencies sometimes settled protests rather than contest them but infrequently by paying protesters money. With the exception of the Census Bureau case, no payment made to protesters in settlement agreements GAO reviewed was higher than $150,000.

The act does not require disclosure of the terms of settlements reached before a final decision is rendered. Agencies agreed to take corrective

action in all settlements that were voluntarily disclosed, but did not agree to corrections in some of the settlements that were not disclosed.

GAO also reviewed the act's provisions for paying successful protesters' costs awarded by GAO and the Board. The act's provisions are not consistent between GAO and the Board and as a result, the agency giving rise to the award of costs is not always responsible for paying them.

Principal Findings

Few ADP Protests Were Filed or Granted

During the second half of fiscal year 1988, 123 protests of the 2,475 ADP contracts awarded by most federal agencies were protested at the Board and GAO. Eighty-seven protesters filed the 123 protests—114 at the Board and 9 at GAO. The highest number of protests filed by a single vendor was 10.

Of the 123 protests filed, 15 were decided in favor of the protesters and 22 in favor of the agencies. Eighty-six were dismissed without a decision on the merits, primarily because the parties settled their disputes before a decision was reached. (See pp. 15 to 21.)

Nearly Half the Protests Were Settled Before Decision

Agencies and protesters settled their differences in 51 of the 123 protests. Settlement terms were disclosed to the Board in 26 of these protests. Agencies had undisclosed written settlement agreements for 12 more. In the remaining 13, the protesters withdrew without reducing settlement agreements to writing and without disclosing the settlement terms. (See pp. 22 to 24.)

Few Settlements Involved Money

Only 2 of the 51 settlements in GAO's 6-month sample involved dollar payments by agencies for protest costs. These payments, neither of which was disclosed to the Board, totalled $24,873. To gain a better perspective as to the representativeness of the frequency and dollar amount of settlements, GAO asked the Board and officials in 13 agencies to identify all other such settlements known to them that had occurred since 1985 when the act became effective. This disclosed an additional six settlements involving payments totalling about $329,000, of which $144,000 was paid from agency funds and $185,000 by winning bidders and a prime contractor. Thus, including the Census Bureau settlement of

$1.1 million, GAO identified a total of 9 settlements to protesters involving about $1.5 million in payments that have occurred since enactment of the act. However, as not all settlements are disclosed to the Board and GAO's review was limited to 13 agencies, there could be other such settlements that GAO did not identify. (See pp. 24 to 26.)

According to agency officials, the primary reason agencies settled the nine protests with money was to avoid procurement delays that would be encountered by contesting the protests. GAO believes that settlements made to reimburse bid preparation costs are appropriate if the agency determines it likely will be held responsible for such costs and is unable to correct the procurement. However, money settlements, in GAO's view, are inappropriate in cases where the agency (1) thinks the protest has no merit, (2) chooses not to correct procurement flaws that can be corrected, or (3) desires to avoid operational delays resulting from the act's suspension procedures. (See pp. 26, 27 and 31.)

Although GAO's review did not show a high incidence of "Fedmail," if agency assertions that an unreasonably high standard for defining urgent and compelling circumstances is correct or becomes correct in the future it could create conditions that would make "Fedmail" more common. While GAO's review was not designed to determine the validity of agency perceptions that the standard is too high, GAO believes the "Fedmail" issue is likely to arise again and should be monitored.

Disclosure Needed to Provide Accountability

To help reduce the possibility that inappropriate settlements will be made and assure full accountability and visibility over the procurement process, GAO concluded that the terms of all agreements should be disclosed in the motion to dismiss Board protests that are settled or in the motion of withdrawal of GAO protests. Disclosure could also assist Congress in monitoring the extent and costs of settlements. GAO does not believe that Board or GAO approval of settlement terms should be required, as this would tend to negate the benefits of quick resolution of disagreements. (See pp. 28 to 31.)

Provisions for Payments of Successful Protesters' Costs Differ

The act provides that Board awards of aggrieved protesters costs are to be paid from the Department of the Treasury's Judgment Fund, with no requirement for the agency to reimburse it. In contrast, the act provides that GAO cost awards are to be paid from agency procurement funds. It is

GAO's view that cost awards arising out of agency misapplication of procurement procedures should be borne uniformly by agency appropriations. (See pp. 33 and 34.)

Recommendations

Congress should amend the act's provisions to require that (1) all terms of protest settlements be disclosed in the motion to dismiss filed at the Board or the notice of withdrawal filed with GAO; and (2) payments of bid protest costs authorized by the Board or GAO be borne by agency appropriations. (See pp. 32 and 34.)

Agency Comments

GAO did not obtain written comments from the agencies whose protests were reviewed. GAO did obtain informal comments from the agencies during the review and based the report's conclusions, in part, on these comments. The Board provided written comments on a draft of this report and stated that (1) the report reflects a misunderstanding of the role played by settlements in the litigation process and (2) it had serious misgivings about the report's discussion of suspension authority in Board proceedings. Changes have been made in this regard on the basis of the Board's comments. The Board's comments and GAO's responses comprise appendix IV.

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Abbreviations

ADP	Automated Data Processing
CICA	Competition in Contracting Act of 1984
GSA	General Services Administration
GSBCA	General Services Administration Board of Contract Appeals

Citing our report on the Census Bureau's handling of a bid protest of an $80 million computer procurement[1] and a press report, the Chairman, Subcommittee on Federal Services, Post Office and Civil Service, Senate Committee on Governmental Affairs, asked us to review the bid protest procedures established by the Competition in Contracting Act of 1984 (CICA), Public Law 98-369. Several press reports we reviewed asserted that computer companies were flooding the government with bid protests and that some companies had routinely protested automated data processing (ADP) procurements. A second assertion was that because it typically takes 3 to 6 months to resolve protests, agencies would prefer to proceed with the procurements, rather than defend their actions, by paying protesters money to withdraw their protests. The press termed this practice "Fedmail." A third assertion was that the ADP protest process has gone awry. The focus of the press reports was limited to ADP-type procurements, not federal procurements in general.

The Chairman asked us to address these assertions and answer the following questions regarding ADP protests filed during the last half of fiscal year 1988:

- How did agencies fare on the protests?
- What did agencies do wrong in the procurements that were successfully protested?
- What was the amount of monetary payments made to protesters?
- Did agencies settle protests to avoid the suspension of their procurements?
- Should settlements be publicly disclosed or approved?
- How are payments of successful protesters' costs handled?

Background

During the course of a federal procurement, vendors may question whether the government's actions are in accordance with applicable procurement statutes and regulations by filing a bid protest. Protests decided in favor of the protester are called "granted" or "sustained" protests; those decided in favor of the agency are called "denied" protests. Many protests are not decided but are dismissed without further consideration because of late filing, lack of jurisdiction, or the protester's request. When the protester and the agency agree to resolve the protest between themselves, they can settle the protest by withdrawal before a decision is reached.

[1]Decennial Census, Minicomputer Procurement Delays and Bid Protests: Effects on the 1990 Census (GAO/GGD-88-70, June 14, 1988).

Permitting bid protests helps ensure that the government carries out procurements in accordance with laws and regulations. Violations of procurement laws and regulations can undermine the integrity of the federal procurement system and can deprive the government of the benefits of competition. For years, however, there was little recourse for disappointed bidders, except with the procuring agency itself.

Beginning in the 1920s, GAO provided prospective contractors the opportunity to establish that an agency's actions were unreasonable or arbitrary. GAO's bid protest function developed gradually, based on the Comptroller General's authority to determine whether funds appropriated by Congress were being properly expended. Although GAO decisions on bid protests lacked a clear statutory base and were actually recommendations to the agencies, agencies generally followed GAO's determinations.

The second forum for deciding bid protests was the federal district courts. However, for many years protesters had no standing before the courts pursuant to the case of Perkins v. Lukens Steel, which was decided by the Supreme Court in 1940. In that case the court held that unsuccessful bidders on federal procurements had no standing to challenge the propriety of contracting officials' actions because the federal procurement statutes were enacted for the government's benefit, not for the protection of sellers. In 1970 the United States Court of Appeals for the District of Columbia concluded that the Administrative Procedures Act of 1946 entitled unsuccessful bidders to judicial review of claims that the agency acted arbitrarily or abused its discretion.[2] Most other federal appeals courts have agreed.

In October 1982, the Federal Courts Improvement Act created a third alternative for disappointed bidders seeking relief—the United States Claims Court, as a successor to the then existing Court of Claims. The Claims Court was given authority to grant complete relief (including judgements and injunctions) on any contract claim brought before a contract is awarded. The rationale was that at the pre-award stage of a procurement when the actual contract for goods or services was not yet in existence, there was an implied contract between the United States and bidders arising from the bid solicitation process guaranteeing that a bid submitted in conformity with the solicitation requirements would be fully and fairly considered.

[2]Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970).

The Competition in Contracting Act of 1984

Enactment of CICA on July 18, 1984, gave GAO for the first time specific statutory authority to decide bid protests and created another forum, the General Services Administration Board of Contract Appeals (GSBCA), for the resolution of ADP procurement protests. The legislative history shows that two of the primary concerns of Congress about the existing bid protest process were (1) the length of time consumed in deciding bid protests and (2) GAO's lack of authority to suspend procurements during its reviews. Agencies could delay the GAO decision process while completing the procurement action, thereby precluding relief to the protester. These concerns were addressed in CICA by (1) establishment of deadlines for consideration of protests and (2) provisions for the suspension of protested procurements.

Title 31 of the United States Code was amended in the following ways:

- Allowed actual or prospective bidders or offerors whose direct economic interest would be affected by the award or by failure to obtain the award to file a protest with the Comptroller General.
- Required the Comptroller General to notify the agency within 1 working day of receipt of the protest. The agency has 25 working days to respond (10 working days under an "express" option), and the Comptroller General has 90 working days (45 calendar days under the "express" option) to issue an opinion.
- Required that if the protest is filed before award, an award may not be made unless the head of the procuring activity finds and reports to the Comptroller General that urgent and compelling circumstances that significantly affect U.S. interests will not permit awaiting a decision. This finding may be made only if an award is likely to occur within 30 days.
- Required that if the agency receives notice of a protest within 10 days after an award, performance must be suspended unless the head of the procuring activity (1) makes a written determination of urgent and compelling circumstances or (2) determines that performance is in the best interests of the U.S. and reports this determination to the Comptroller General.
- Required, in the event that the protest is sustained, that the Comptroller General recommend corrective action and the head of the procuring activity notify the Comptroller General within 60 calendar days if the recommendations are not implemented.
- Authorized the Comptroller General to grant the reimbursement of bid or proposal preparation costs and costs incurred in making the protest. The costs must be paid from the agency's procurement funds.

The Federal Property and Administrative Services Act of 1949 was amended as follows:

- Set up a 3-year program to allow the GSBCA to resolve protests involving procurement of ADP resources under the Brooks Act, 40 U.S.C. 759.[3]
- Required the GSBCA, at the request of an interested party and within 10 days of the filing of the protest, to hold a hearing to determine whether the procurement at issue should be suspended, and to issue a final decision on the protest within 45 working days after the protest is filed, unless the GSBCA's Chairman determines that specific and unique circumstances require a longer period of consideration.
- Required that if the protest is made before the contract award the GSBCA must suspend the ADP procurement authority or delegation of authority from the Administrator of the GSA for the procurement at issue unless the agency establishes that urgent and compelling circumstances that significantly affect U.S. interests require award and that the award is likely to occur within 30 days of the suspension hearing.
- Required that if the GSBCA receives notice of a protest within 10 days after contract award the GSBCA must suspend the procurement at issue until the GSBCA issues a decision on the protest, unless the agency establishes that urgent and compelling circumstances that significantly affect U.S. interests will not permit waiting for the GSBCA's decision.
- Authorized the GSBCA to grant reimbursement of the costs of filing and pursuing the protest (including reasonable attorney fees) and preparing the bid or proposal. The costs are to be paid from the Department of the Treasury's Judgment Fund. CICA provides that frivolous protests or those that do not have a prima facie basis for protest could be summarily dismissed by the GSBCA or GAO.

Although the initial intention was to establish a 3-year test for the GSBCA's program, with the passage of the Paperwork Reduction Reauthorization Act of 1986, Congress made the GSBCA a permanent forum for hearing ADP protests.

Suspensions of Procurements

According to the press reports we reviewed, Fedmail is allegedly paid by agencies in order to avoid suspensions of their procurements (as provided by CICA) while protests are resolved. The standard for suspending

[3]The Brooks Act gives the Administrator of GSA the authority to coordinate and provide for the economic and efficient purchase, lease, and maintenance of ADP equipment by federal agencies. The Administrator can delegate procurement authority to agencies when such action would be necessary for the economy and efficiency of operations or essential to national defense.

a protested pre-award procurement is the same at GAO and the GSBCA—the absence of "urgent and compelling circumstances."

Any party protesting a Brooks Act ADP procurement may elect to protest to either the GSBCA or GAO. If it protests to the GSBCA before, or within 10 days after, award of the contract, it can request to have a hearing to determine whether the agency's procurement authority should be suspended pending a decision on the protest. The GSBCA must grant the suspension unless the agency can show that, without suspension, award of the contract is likely to occur within 30 days of the suspension hearing and urgent and compelling circumstances significantly affecting the interest of the U.S. will not permit waiting for a decision from the GSBCA.

When a protest is filed at GAO before award, the agency cannot make an award before the protest has been resolved unless the head of the procuring activity decides that there are urgent and compelling circumstances significantly affecting the interests of the U.S. that will not permit waiting for GAO's decision.

Similarly, when the agency learns of a protest within 10 days after an award has been made, the agency must direct the contractor to stop work until the protest has been resolved unless (1) the head of the procuring activity finds that it is in the government's best interests to continue performance or (2) urgent and compelling circumstances significantly affecting the interest of the U.S. will not permit waiting for GAO to decide the protest.

The CICA standard—imposition of a suspension in the absence of "urgent and compelling circumstances"—makes it easier to obtain a suspension before GAO or the GSBCA than to obtain a preliminary injunction in a lawsuit in federal court. To obtain a preliminary injunction, a protester in federal district court or the Claims Court, like other litigants in those forums, generally must establish that (1) it has a likelihood of prevailing on the merits; (2) it would be irreparably injured without such relief; (3) an injunction would not substantially harm other interested persons; and (4) the public interest would not be significantly harmed.[4] Thus, a protester seeking to delay the government from taking a procurement action must carry the burden of persuading the court that its case has substantial merit.

[4]WMATC v. Holiday Tours, 559 F.2d 841 (D.C. Cir.) 1977.

Objectives, Scope, and Methodology

Our objectives were to answer specific questions raised by the Subcommittee and to test the validity of assertions made in several press articles regarding ADP protests. Specifically, we obtained information on (1) the results of recent ADP protests filed at the GSBCA and GAO, (2) settlements and resulting payments made to protesters on those protests, and (3) payments to protesters who won a decision at the GSBCA or GAO.

To determine the sources, processing time, and results of ADP protests filed, we set out to answer the following questions:

- Are computer companies flooding the government with ADP protests?
- Do some companies routinely protest ADP procurements?
- Do protests take as long as 3 to 6 months to resolve?
- How did agencies fare on protests filed?
- What did agencies do wrong in the procurements that were successfully protested?

To answer these questions, we identified and reviewed all of the 123 ADP protests filed at the GSBCA and GAO during the last half of fiscal year 1988, from April 1 to September 30, 1988. These protests involved 28 federal agencies, which are listed in appendix I. Because we were asked to review the bid protest procedures established by CICA and the press articles we reviewed focused on GSBCA cases, we did not look at protests filed with the agencies or the courts. For each case, we reviewed the protest, the decision, and the GSBCA's or GAO's administrative records relating to the case. We calculated the number of days it took to decide each case, as well as how long each affected procurement was suspended. The results of our work comprise chapter 2.

Regarding settlements and resulting payments to protesters, we addressed the following questions:

- How common were settlements and payments to protesters?
- What agreements did agencies make in settlements during the last half of fiscal year 1988?
- What was the amount of settlement payments during the last half of fiscal year 1988 and since CICA was enacted?
- Did agencies settle protests to avoid having their procurements suspended?
- Should the terms of all settlements be disclosed or approved by the GSBCA or GAO?

To obtain information to answer these questions, we reviewed settlement agreements that were submitted to the GSBCA or GAO during the last half of fiscal year 1988. In order to obtain a more comprehensive view of payments made before the last half of fiscal year 1988, we (1) asked the GSBCA and the 13 agencies to identify any monetary settlements made with protesters since January 15, 1985, when CICA became effective; (2) reviewed those settlements and contacted the protesters or their attorneys and the attorneys or contracting officers in the relevant agencies; and (3) obtained officials' opinions on the need to disclose settlements and obtain approval from the GSBCA or GAO, on all settlements. The 13 agencies we contacted (see app. II), were those agencies that had settled protests during the last half of fiscal year 1988 without giving reasons for settling to the GSBCA. The results of our work are in chapter 3.

Finally, we wanted to determine how payment of protest costs to winning protesters is handled. To obtain this information, we reviewed records on the Judgment Fund maintained in GAO. Chapter 4 contains the results of our work.

During the course of our evaluation, we also interviewed officials at the GSBCA, the GSA, the Federal Procurement Data Center of the GSA, the Computer and Communications Industry Association, the Computer and Business Equipment Manufacturers Association, the President's Council on Integrity and Efficiency, and the President's Council on Management Improvement. The councils sponsored study groups that looked into the Fedmail issue before our evaluation.

In addition, we reviewed recent reports in the general and specialized press on ADP bid protests, summary information on bid protests maintained by the GSBCA and GAO, and summary information on ADP contracts maintained by the Federal Procurement Data System.

At the request of the Subcommittee, we did not obtain written comments from the agencies whose protests we reviewed or from other interested parties. We did obtain informal comments from agencies as we did the review and incorporated them into this report where appropriate. We obtained written comments from the GSBCA on a draft of this report. GSBCA's comments and our responses are presented in appendix IV and elsewhere in this report, as appropriate.

We did our work from October 1988 through June 1989 in accordance with generally accepted government auditing standards.

Few ADP Protests Were Filed or Granted

Computer companies did not flood the government with ADP bid protests during the 6-month period we reviewed. Of the ADP contracts awarded during the period, 107—or about 4 percent—were protested to the GSBCA or GAO. Most of the vendors filing protests filed only one. Some filed two or more; one vendor filed 10. Decided protests, on the average, took 40 working days to resolve and resulted on average in a 26 working-day suspension of the procurements, not the 3- to 6-month delay asserted in the press reports. More protests were settled between the agencies and protesters than were decided by the GSBCA or GAO.

In 17 of the 123 protests, the agency was determined to have violated procurement statutes or regulations, primarily by limiting the protesters' opportunities to compete.

Few ADP Procurements Were Protested at GSBCA and GAO

From April 1, 1988, to September 30, 1988, 123 ADP bid protests were filed at the two forums established by CICA to hear bid protests—114 at the GSBCA and 9 at GAO. The protesters are listed by agency in appendix I.

According to the Federal Procurement Data System,[1] federal agencies awarded about 2,475 new ADP contracts (as opposed to contract modifications or orders under existing contracts) each obligating over $25,000 during the period April 1 to September 30, 1988. These 2,475 contracts obligated a total of about $978 million during this period. This total does not include 4,600 procurement actions that obligated a total of $295 million based on orders under the General Services Administration's ADP schedule contracts during this period.

Some of the 123 protests filed during our sample period were multiple protests of the same procurement. In total, 107 different procurements were protested. Therefore, about 4.3 percent of the 2,475 ADP contracts awarded were protested at either GAO or the GSBCA. Fifty of the 123 protests reviewed were protested before contract award, and 73 were protested after contract award. The 123 protests were filed against 28 agencies, as shown in table 2.1.

[1]The system was established by Public Law 93-400 to collect, develop, and disseminate procurement data to meet the needs of Congress, the executive branch, and the private sector. The system includes procurement data reported by 62 agencies. It does not include procurements made by legislative branch agencies and certain other agencies, such as the Central Intelligence Agency and the National Security Agency.

Table 2.1: Distribution of ADP Bid Protests by Agency

Agency	Number of protests
Department of the Army	24
Department of the Navy	13
Department of Veterans Affairs	10
Department of the Air Force	9
Department of Transportation	9
Department of Health and Human Services	8
Department of Energy	7
Department of Agriculture	6
General Services Administration	4
Department of the Interior	4
United States Postal Service	4
Department of Commerce	3
Department of Justice	3
Department of the Treasury	3
Defense Mapping Agency	2
Federal Emergency Management Agency	2
Department of Defense	1
Defense Communications Agency	1
Environmental Protection Agency	1
General Accounting Office	1
Government Printing Office	1
Department of Housing and Urban Development	1
Department of Labor	1
National Aeronautics and Space Administration	1
National Archives and Records Administration	1
Office of Personnel Management	1
Securities and Exchange Commission	1
United States Information Agency	1
Total	**123**

Protests Were Widely Distributed Among Vendors

Overall, 87 protesters filed the 123 protests. Most of the protesters (79.3 percent) filed one protest. However, 1 protester filed 10. An official from this firm said that the company protests about 1 out of every 10 procurements that they bid on because (1) agencies often issue restrictive specifications that unjustly limit full and open competition and (2) it is inexpensive to protest as the firm does not use outside counsel. This official said that most of the protests filed result in the agencies amending the solicitations before award. The distribution of the number of protests per firm is shown in table 2.2.

Table 2.2: Distribution of ADP Bid Protests by the Number of Firms

Number of protests	Number of firms	Total number of protests
1	69	69
2	10	20
3	4	12
4	3	12
10	1	10
Total	**87**	**123**

Protests Did Not Take 3 to 6 Months to Resolve

CICA requires the GSBCA to reach a decision on ADP protests within 45 working days and GAO to decide bid protests within 90 working days. Overall, the 123 cases were resolved by GAO and the GSBCA in an average of 23.9 working days. As shown in table 2.3, however, the time taken to reach a decision varied, depending upon the outcome of the decision. The protests that were actually decided on merit (not dismissed) took an average of 40.1 days to decide.

Table 2.3: Average Number of Working Days to Reach a Decision on ADP Bid Protests

Outcome	Number of cases	Avg. no. of working days to reach a decision
Granted[a]	14[b]	38.6
Denied[c]	18[d]	41.6
Dismissed		
Not ADP	9	17.1
Not Brooks Act ADP	5	22.4
Lack of jurisdiction	3	31.3
Agency took corrective action	2	14.5
Protest pending before another forum	1	24.0
Untimely	2	13.0
Protester not harmed by action	1	19.0
Parties reached settlement	51	15.7
Not stated why, no settlement	9	17.6
Lack of jurisdiction, untimely	1	15.0
Withdrawn	1	9.0
Declined to reinstate protest	1	9.0
Subtotal	86	17.0
Joint decision		
Dismissed in part, denied in part	4	38.0
Dismissed in part, granted in part	1	45.1
Subtotal	5	39.4
Total	**123**	**23.9**

[a]Protests that are decided in favor of the protester.

[b]This number does not include the protest that was granted in part and dismissed in part, which is listed under the joint decision category in this table.

[c]Protests that are decided in favor of the agency.

[d]This number does not include the four protests that were denied in part and dismissed in part, which are listed under the joint decision category in this table.

CICA also requires that the award or performance of a protested procurement be suspended unless urgent and compelling circumstances that significantly affect U.S. interests will not permit awaiting a decision and, for pre-awards, the award is likely to occur within 30 days. As shown in table 2.4, about half of the protests did not result in a suspension of the procurement, and some of the procurements were only partially suspended. An example of a partial suspension would be one in which the GSBCA allows the agency to continue evaluating proposals received while the protest is being decided but prohibits the agency from awarding a

contract until the case is decided. Of those cases that resulted in a suspension, the time suspended averaged 24.2 working days.

Table 2.4: Average Number of Working Days ADP Procurements Suspended Due to Bid Protests

	Number of protests	Average number of working days suspended
Fully suspended	40	24.8
Partially suspended	18	22.8
Not suspended	63	N/A
Data not available	2	N/A
Total	**123**	**24.2**

Few Protests Were Granted

Most of the 123 protests were dismissed primarily because the parties reached a settlement, and relatively few protests were granted, as shown in table 2.5.

Table 2.5: Outcomes of 123 Sample ADP Bid Protests

Outcome	Number of protests	Percentage of protests
Granted	14[a]	11.4
Denied	18[b]	14.6
Dismissed		
Not ADP	9	7.3
Not Brooks Act ADP	5	4.1
Lack of jurisdiction	3	2.4
Agency took corrective action	2	1.6
Protest pending before another forum	1	0.8
Untimely	2	1.6
Protester not harmed by action	1	0.8
Parties reached settlement	51	41.5
Not stated why, no settlement	9	7.3
Lack of jurisdiction, untimely	1	0.8
Withdrawn, no decision	1	0.8
Declined to reinstate protest	1	0.8
Subtotal	86	69.8
Joint decision		
Dismissed in part, denied in part	4	3.3
Dismissed in part, granted in part	1	0.8
Subtotal	5	4.1
Total	**123**	**99.9[c]**

[a]This number does not include the protest that was granted in part and dismissed in part, which is listed under the joint decision category in this table. Two of the 14 protests granted involved a contract awarded by the Postal Service and were overturned by the United States Court of Appeals in September 1988 on jurisdictional grounds.

[b]This number does not include the four protests that were denied in part and dismissed in part, which are listed under the joint decision category in this table.

[c]Percentage of protests does not total to 100 due to rounding.

The breakdown by agency of the 14 granted protests and the 1 protest that was dismissed in part and granted in part is as follows: Department of the Army, 3; Department of the Air Force, 2; United States Postal Service, 2; Department of Justice, 2; and 1 each for Department of Energy, Office of Personnel Management, Department of Transportation, Department of the Navy, Government Printing Office, and National Archives and Records Administration. One protester won 2 protests, and the other 13 were won by 13 different firms.

In 17 of the 123 protests, or 13.8 percent, it was determined that the agency violated laws or regulations. Included in the 17 protests were the

14 protests that were granted in full, 1 protest granted in part and dismissed in part, 1 that was denied and the agency took corrective action, and another that was denied in part and dismissed in part. The specific violations in these 17 protests primarily involved agencies limiting the protesters' opportunities to compete (see app. III). For example, in three protests the GSBCA found that the agency evaluated proposals on factors not specified in the solicitation. In other cases, the GSBCA found that the agency did not properly document the need for specific make and model specifications in the solicitation and did not describe the Government's requirements clearly, accurately, and completely in the invitation for bids.

Conclusions

Assertions appearing in press reports that the government has been flooded with ADP protests and that some companies routinely protest ADP procurements were not supported by our analysis of protests filed at GAO and the GSBCA during the second half of fiscal year 1988. A small percentage of the contracts awarded were protested. Specific firms did not abuse the process because most vendors filed only one protest.

Resolving protests did not take as long as 3 to 6 months, as asserted in the press reports. Decided protests based on the merits of the case averaged 40 working days to resolve and resulted in an average 26 working-day suspension of the procurements. Many protests did not result in a suspension of the procurement because they were settled before the decision to suspend was made. Few protesters proved through a decision on the merits that the government violated procurement laws and regulations, and most protests were dismissed before a decision was reached, primarily because the agency and the protester reached a settlement. Chapter 3 discusses why the agencies settled many protests.

Many Protests Were Settled, but Few With Money

Settlements of ADP bid protests were common, accounting for 51 of the 123 protests filed during the last half of fiscal year 1988. Terms of the settlements were disclosed in 26 of the cases settled. All the disclosed settlements noted that the agency was taking corrective action, usually by allowing the protester to compete. We followed up with the agencies on the 25 settlements they did not disclose to the GSBCA and found that they had settlement agreements for 12, including 5 that provided that the protester would be allowed back into the competition.

Only two payments were made by agencies to protesters in the 123 protests we reviewed. Moreover, the 13 agencies and the GSBCA identified only 7 additional monetary settlements since CICA became effective. Altogether, in the nine settlements in which payments were identified, agency officials said that payments were made primarily to enable the agency to proceed with procurements and avoid operational delays that would be encountered if they contested the protests.

GSBCA's interpretation of a 1987 court ruling precludes it from (1) inquiring into the terms of settlements reached before a decision on the merits of the protest or (2) approving those settlements. Most private sector and agency officials contacted thought all settlement terms should be disclosed, but they disagreed as to whether GSBCA or GAO approval was desirable.

Settlements Were Common

Because the parties reached settlements before decisions were issued, 51 (or about 42 percent) of the 123 ADP bid protests filed during the last half of fiscal year 1988 were dismissed. These protests, all filed with the GSBCA, involved 17 agencies and 37 protesters.

Twenty-six of these 51 settlements disclosed the nature of the settlement. All of them were settled because the agency agreed to take corrective action. The corrective actions agreed to are shown in table 3.1.

Table 3.1: Corrective Actions Agreed to in Disclosed Settlements

Corrective actions agencies agreed to take	Number of protests[a]
Amend the request for proposals/specifications/ requirements	11
Cancel the protested contract/request for quotes/ solicitation	8
Conduct discussions/negotiations with protester	7
Reevaluate previously submitted proposals	3
Extend due date for the request for proposals/ accept protester's bid as timely submitted	2
Resolicit procurement	2
Open up solicitation for bidding by protester	2
Appoint a new evaluation team/transfer procurement to a different contracting office	2
Notify protester of any future solicitations	2
Terminate the protested contract and award a contract to protester	1
Declare the bid submitted by winning contractor to be nonresponsive	1
Invite a new round of best and final offers	1
Limit the quantities ordered from protested procurement	1
Seek and direct support-service contractors to use full and open competition in the future	1
Retest protester's equipment and allow protester to remedy any deficiencies found	1
Allow protester to make a presentation regarding the benefits of used ADP equipment	1
Will not exclude the acceptability of protester's proposal by further amending the request for proposal	1

[a]Some of the settlements involved more than a single corrective action.

The most frequent corrective action the agencies agreed to take in voluntary settlements was to amend the requests for proposals, the specifications, or the requirements. In most of these protests, vendors protested that specific requirements in the solicitations were too restrictive to promote full and open competition. The effect of these settlements was to keep the protesters' offers under consideration after a point where they would otherwise have been out of consideration.

We did more detailed work on the 25 protests that were dismissed without disclosure of settlement terms. We contacted the contracting officers or attorneys in the 13 agencies that were involved and the protesters or their attorneys. The agencies had settlement agreements in their files for 12 of the 25 protests. The agreements reached in the 12 protests are summarized in table 3.2. Two of the 12 protesters were paid money. In another 5 of the 12 protests, the protesters were allowed back into the competition, and as a result 2 of them were eventually awarded the contracts.

Table 3.2: Agreements Reached in 12 Undisclosed Settlements

Agreements	Number of protests[a]
Protester agreed to withdraw protest and each party agreed to pay its own costs	3
Protester agreed to withdraw protest from GSBCA and pursue protest with agency	2
Agency agreed to admit/readmit protester into the competition, retest equipment, or review proposal	3
Agency agreed to pay protest costs, including attorneys' fees	2
Agency agreed to reprimand procurement employee regarding errors made in the procurement process	2
Agency agreed to amend solicitation and resolicit procurement	2

[a]Two protests had two agreements.

Agency officials said that they agreed to settle the 12 protests for the following reasons:

- They wanted to avoid costly and/or lengthy litigation (seven protests).
- They made errors in the protested procurement and agreed to settle to compensate for the error (five protests).
- They expected to lose the case (two protests).
- They feared further review would result in the loss of delegated procurement authority (one protest).

In the remaining 13 (of the 25 protests with undisclosed settlements), vendors withdrew the protests without reducing the settlement agreements to writing and without disclosing the settlement terms. Two protests were deemed non-ADP procurements, and, in the other protests, the protesters discovered through examination of agencies' information that either the protested agency decisions were valid or that the protesters' cases were weak.

Payments to Protesters Were Uncommon, but Occurred

Of the 123 bid protests filed during the last half of fiscal year 1988, 20 involved protester requests for reimbursement of protest costs.[1] In two of the protests the agency paid the protesters directly, as part of a settlement agreement. The amount the agencies paid to the protesters in these 2 protests was $24,873. In the other 18 protests, the protesters asked the GSBCA to authorize the payments. Two of the 18 GSBCA decisions on protests were subsequently overruled by the United States

[1]Two of the 20 protests included not only protests costs but also reimbursement of protesters' bid preparation costs.

Court of Appeals, which ruled that the GSBCA did not have jurisdiction over the protests, thus nullifying the requests for reimbursement of protest costs. Of the remaining 16 requests before the GSBCA, 12 were paid, and 4 were pending as of July 27, 1989. The 12 payments totaled $235,584 against protester requests of $256,743. Protesters have requested $129,320 in the 4 requests that are pending.

To gain a better perspective on how frequently agencies have paid money to protesters to withdraw protests simply so that agencies could proceed with procurement operations—a practice the press has termed Fedmail—we asked the GSBCA and officials in the 13 agencies where we did follow-up work to identify all such settlements known to them that may have occurred since 1985, when CICA became effective. They identified a total of eight protests in which payments may have occurred. We did additional work on these eight protests and on the Census Bureau protest that we reported on in 1988.

Of the 11 cases we followed up on (the 2 cases where agencies paid money to settle protests in our sample of 123, the 8 protests referred by GSBCA and federal agencies, and the Census Bureau case), we were able to identify approximately $1.5 million in monetary payments in 9 protests since CICA was enacted. The amount paid in each case is shown in table 3.3.

Table 3.3: Amount of Payments to Protesters in Nine ADP Bid Protest Settlements Since 1985

Protester	Amount	Source of money used for payment
1	$4,873[a]	Agency
2	13,367	Agency
3	20,000[a]	Agency
4	20,796	Agency
5	35,000	Agency
6	10,000	Winning bidder
7	100,000	Prime contractor
8	75,000	Agency
	75,000	Winning bidder
9	1,113,115	Agency
Total	**$1,467,151**	

[a]Protest was one of the two settlement cases that occurred during our sample period of the second half of fiscal year 1988.

The Bureau of the Census protest accounted for approximately $1.1 million of the $1.5 million. Winning bidders made payments in two of the

protests and may have made payment in another protest.[2] Other payments that we did not identify could have been made since we limited our work to (1) cases filed during the last half of fiscal year 1988, (2) other cases in which the GSBCA suspected payments might have occurred, and (3) the 13 agencies where we did follow-up work.

According to agency officials, the reason they settled six of these protests was to avoid procurement and litigation delays that would be encountered by contesting the protests at the GSBCA. In another protest, officials said that they settled because, although the protest was against only 5 percent of the procurement, they feared that if the protest was heard, the GSBCA would suspend the entire procurement. Officials said they paid protesters money in the remaining two protests because they had made errors in the procurements.

Agencies also agreed to take corrective action in five of the nine protests. Corrective action included counseling the contracting officer, amending the solicitation, and discontinuing the use of a restrictive clause in future procurements. No corrective action was taken in the other four protests. Although the agencies agreed to take corrective action, only two protesters were allowed back into the competition for these procurements. One of the protesters, given the option of re-entering the competition or taking the monetary settlement, chose to take the money.

Agencies did not disclose the terms of the settlement to the GSBCA for four of the nine protests in which payments were made.

Settlements Made to Avoid Procurement Suspensions

As noted earlier in this chapter, agency officials said that the primary reason for settling 12 protests with undisclosed settlements and 6 protests with money was to enable the agency to proceed with procurements and to avoid operational delays that would be encountered by contesting the protests. We reported in 1988 that the Census Bureau paid $1.1 million to 3 bidders because Census felt it could not afford the additional time required to resolve the protest, regardless of the merits. Since none of these protests was ever decided on the merits, we do not know whether the protesters raised legitimate bases of protest or not.

[2]Agency officials and the protester refused to divulge the settlement terms to us. However, they indicated that the winning bidder and the protester settled without using government funds.

The Census Bureau's experience and concern about GSBCA's bid protest procedures prompted a Department of Commerce official in 1987 to ask the President's Council on Management Improvement to initiate a study of the effects the GSBCA suspension authority had on agency operations. The Commerce official was concerned that the GSBCA's bid protest procedures and suspension authority had an adverse effect on agency operations because they subject agencies to

- temporary suspensions of their delegated procurement authorities although the bases for filing protests may have no merit,
- the need for dedicating considerable resources to the resolution of procurement authority suspensions,
- costly delays in processing critical procurements, and
- the likelihood of entering into limited dollar settlements with protesters in order to keep procurements on track.

Although no written report was issued, members of the study group said that they found a few anecdotal examples of adverse effects. They were unable to develop evidence capable of supporting any conclusions and referred the matter to the President's Council on Integrity and Efficiency for further study. This study was completed in 1988 without a formal report. The draft report concluded that Commerce's allegations that GSBCA's suspension procedures were adversely affecting procurement operations throughout the government were difficult to prove.

Because of the agencies' claims that settlements were sometimes made to avoid CICA's suspension provisions, we asked 33 procurement officials and attorneys in the 13 agencies we reviewed if they attempted to contest procurement suspension by claiming there were urgent and compelling circumstances.[3] These officials said that they contested procurement suspensions because of urgent and compelling circumstances for 3 of the 34 protests but did not contest the suspension of the other 31, as shown in table 3.4.

[3]We discussed with them in detail the 25 protests that were settled with undisclosed agreements in our sample of 123, 8 protests identified by the GSBCA and the agencies themselves, and the Bureau of the Census protest we reported on in 1988.

Table 3.4: Agencies' Decisions to Challenge Suspension in 34 Follow-Up Cases

Agency contested suspension	Number of protests
Reason	
Urgent and compelling circumstances	3[a]
Agency did not contest suspension	
Reason	
GSBCA standards for urgent and compelling too high and too narrow; past efforts to convince the GSBCA had been unsuccessful and resulted in wasted effort and time	16
Protest was withdrawn before suspension hearings were held	6
Protester's request for suspension not filed, or filed too late	5
Time was not an important factor	3
Protester agreed to a partial suspension	1
Total	**34**

[a]The GSBCA fully suspended the procurement in one of these protests and partially suspended the other two.

The primary reason given for not contesting the suspension of the procurements was that past efforts to convince the GSBCA had been unsuccessful and resulted in wasted effort and time. Many of the officials offered the view that GSBCA standards for establishing urgent and compelling circumstances are too strict.

While many agency officials we interviewed thought that the GSBCA's standards and interpretations of urgent and compelling were too strict, a GSBCA member said that the costs of suspending procurements are not great. Others in the private sector agreed with the GSBCA member and said that a 45-day delay is insignificant in view of the length of time it typically takes the government to procure ADP. They also said that suspensions are necessary because if protesters cannot stop a procurement, they may not be able to obtain relief.

Disclosure and Approval of Settlements

Many protests are settled between agencies and the protesters (sometimes with money) without disclosing the terms of the settlements. Most private sector and agency officials we interviewed thought all settlement terms should be disclosed but were divided as to whether GSBCA or GAO approval was desirable.

Generally, GSBCA interprets a court order as preventing it from asking about the terms of settlements for protests that are settled before a decision is reached. In April 1987 the United States Court of Appeals for the

Federal Circuit overruled a GSBCA decision denying a bid protest settlement.[4] The GSBCA had refused to accept a settlement reached among the parties, arguing that dismissing the protest would allow the agency to continue with an improperly awarded contract while paying the nominally prevailing protester a substantial amount of government money. In its decision, the GSBCA further argued that to permit such actions would turn the Brooks Act procurement and CICA protest process "on its head and would disregard specific congressional intent to protect the public interest by preventing agencies from running slipshod over statutes and regulations." The United States Court of Appeals overturned the GSBCA's decision stating that the GSBCA abused its discretion in not dismissing the protest in light of the settlement reached by the parties.

The GSBCA cites this decision to show its lack of authority to approve or disapprove settlements. In fact, the GSBCA has interpreted the Court's order as preventing the GSBCA from inquiring about the terms of settlements except where, following a Board determination sustaining the protest, both parties ask for an award of costs to be paid from the Judgment Fund. In some cases, the GSBCA dismisses cases at the parties' joint motion to have them dismissed, without reviewing the parties' reasons for settling or the agreements reached between the parties.

Although the settlement of disputes outside of formal adjudication is not unusual and should be encouraged, we believe that those settlements reached after a CICA bid protest has been filed should be disclosed to the public to keep the procurement process visible and accountable. A vast majority of the officials in the private sector and federal agencies we contacted agreed that settlement terms should be disclosed.

As to the desirability of requiring GSBCA or GAO approval of settlements, agency and private sector officials we interviewed had differing viewpoints. Pro-approval arguments included the following:

- An independent party is needed to ensure the credibility of the settlement process.
- Without independent approval agencies might abuse the process.
- The public has a right to have an outsider serve as a check and balance over agreements reached between agencies and vendors.

Others felt that approval of settlements by the GSBCA or GAO was unnecessary and undesirable because

[4]Federal Data Corporation v. SMS Data Products Group, 819 F.2d277 (Fed. Cir. 1987).

- settlements save both parties time and money, the benefits of which would be negated by requiring approval;
- agencies already have the inherent right to settle protests on their own;
- protest costs would increase if approval of settlements was required;
- agencies should be able to settle protests when the agency and the vendor agree that the agency committed an error;
- approvals generally limit compromises;
- parties are permitted to settle other civil disputes in our country without obtaining outside approval;
- an agency given the authority to spend large sums of money to purchase ADP equipment should also be able to handle settlements without involvement of an oversight body; and
- the GSBCA or GAO is not in the best position to evaluate the merits of settlements because only the agency involved is aware of all the circumstances.

Conclusions

Agency settlements with ADP bid protesters, though common, seldom include an agreement to pay money to the protester. In addition, they are not always disclosed to the GSBCA or GAO. Agencies agreed to take corrective action in all of the settlements that were disclosed to the GSBCA but did not agree to take corrective action in some of the undisclosed settlements. Although we identified only four undisclosed settlements in which payments were made to protesters, more that were not disclosed could exist because our follow-up was limited to 13 agencies.

According to agency officials, most settlements are made by agencies to avoid operational delays and costly and lengthy litigation or to compensate for errors made in the procurement process. However, the reasons for some settlements are unknown. One settlement was made to avoid the possibility of the agency's losing its procurement authority if the facts of the case were reviewed by the GSBCA.

CICA and its legislative history do not mention whether agencies are authorized to settle bid protests by paying money to protesters. We have held that in some cases an agency may settle a protest by reimbursing the protester's bid preparation costs on the theory that the submission of a bid creates a duty on the part of the agency to give the bid full and fair consideration, and that where a protester is deprived of a contract because the agency fails to do so, the agency may be liable for the bid preparation costs.

We do not oppose monetary settlements that reimburse a protester's bid preparation costs (but not attorney fees) if an agency determines that it likely will be held responsible for such costs and is unable to correct the procurement. However, if an agency offers monetary settlements solely to avoid operational delays resulting from CICA's suspension procedures, we believe there is no basis for the settlement. Further, we would question the appropriateness of monetary settlements where the agency (1) thought the protest had no merit or (2) chose not to correct procurement flaws that could be corrected, but settled with money because it would take less time.

We have held in many contexts that agency officials may not pay attorney fees in connection with the settlement of a dispute or claim in the absence of statutory authority to do so. While CICA contains explicit authority for GAO and the GSBCA to award attorney fees in connection with the resolution of bid protests, it does not provide the authority for agencies to do so. In the absence of clarification by Congress, we believe that agencies should refrain from the use of their funds for these types of reimbursements.

Because not all settlements are disclosed, the fact that our review did not show a high incidence of Fedmail is not conclusive evidence that there is no problem. Moreover, if agency assertions that an unreasonably high standard is applied in determining what is urgent and compelling are correct, resorting to Fedmail could become more common. Although our review was not designed to determine the validity of these assertions by the agencies, we believe the Fedmail issue should be monitored.

To help reduce the possibility of future inappropriate settlements and to assure accountability and visibility in the procurement process, we believe that the terms of all settlements should be disclosed in the motion to dismiss GSBCA protests that are settled between the parties and in notices of withdrawal of GAO protests. Disclosure would also assist Congress in monitoring the extent and costs of settlements. We do not believe that settlements should have to be approved by the GSBCA or GAO, primarily because approval would tend to negate the benefits of quick resolution of disagreements. We believe full disclosure would tend to assure responsible agency action.

Recommendation to Congress

Congress should amend CICA to require that all terms of protest settlements be disclosed in the motion to dismiss filed at the GSBCA and in the notice of withdrawal filed with GAO. Such information would be beneficial to Congress in its oversight of agency operations.

GSBCA Comments and Our Evaluation

In its comments, which are presented in appendix IV, the GSBCA agreed that the responsibility for settlements should be placed with the agency—a party to the lawsuit—but thought that requiring disclosure might discourage settlements. The GSBCA said that it was not convinced that disclosing settlements would curb potential abuse.

We believe that requiring disclosure would discourage abusive settlements and would not discourage settlements for appropriate reasons. Without disclosure, the public is not able to determine if settlements are abusive or not. Further, disclosure would dispel suspicions that the press and the public might have. We continue to believe that agencies should be held accountable for all agreements made.

Provisions for Payment of Successful Protesters' Costs Differ

Under CICA, payments of bid protest costs to successful protesters awarded by the GSBCA are made from the Department of the Treasury's Judgment Fund with no requirement for reimbursement by the agency, and awards by GAO are paid from agency appropriations. This lack of uniformity has resulted in confusion.

CICA Provisions

CICA gave both the GSBCA and GAO the authority to award bid preparation and protest costs to successful protesters. CICA provides that when the GSBCA determines that an agency has violated a statute or regulation and a protester is entitled to recovery of bid preparation and/or litigation costs, the costs are to be paid from the Judgment Fund. In contrast, CICA provides that when GAO makes such a determination in favor of a bid protester, the costs are to be paid from the agency's procurement funds.

For the GSBCA decisions, CICA generally adopted the wording that already existed in the Contract Disputes Act of 1978. This act provided a statutory basis for federal agency boards of contract appeals to hear and decide contract (not bid protest) disputes between contractors and agencies.[1] However, while both the Contract Disputes Act and CICA allow the GSBCA to authorize payments out of the Judgment Fund, only the Contract Disputes Act explicitly requires agencies to reimburse the Fund for such payments. CICA contains no such requirement and thus provides no direct incentive for agencies to resist unjustified settlements, since their funds are not involved.

Provisions Have Caused Confusion

Because CICA does not require agencies to reimburse the Fund in bid protest cases, there has been some confusion in making administrative and policy decisions. For example, part 33.104 of the Federal Acquisition Regulation, the primary procurement regulation for all federal executive agencies, agrees with CICA and says that bid protest costs awarded by GAO must be paid by the agency from funds available for the acquisition of supplies or services. Part 33.105, however, disagrees with CICA and provides that GSBCA awards of bid protest costs must also come from the same source.

[1]The Contract Disputes Act of 1978 stipulated payment from the Judgment Fund to enable prompt payment fo. granted claims. Congressional intention was to reduce delays resulting from Congress sometimes having to appropriate additional funding for the agencies involved.

The GSBCA is of the view that it is empowered to order reimbursement of the Fund from agency appropriations in appropriate cases.[2]

Conclusions

The legislation authorizing bid protest cost awards by the GSBCA and GAO is not consistent. All bid protest cost awards should be borne by agency appropriations. We do not believe that the provisions of the Contract Disputes Act, which enables such payments for sizable contract claims, need to be applied to ADP bid protest cost awards, which are generally much smaller in amount, since only bid preparation and/or litigation costs can be awarded. Further, the agencies responsible for an award of costs to a successful protester should be responsible for paying those costs.

Recommendation to Congress

Congress should amend CICA to require that payments of bid protest costs authorized by the GSBCA and GAO be borne by agency appropriations.

[2]Julie Research Laboratories, Inc., GSBCA No. 9075-C (8919-P).

ADP Bid Protests Filed With the GSBCA and GAO From April 1 to September 30, 1988

Department of Agriculture	
GSBCA No.	**Protester**
9461-P	Integrated Computer Solutions, Inc.
9494-P	International Business Machines Corporation
9658-P	Federal Systems Group, Inc.
9676-P	Comdisco, Inc.
9686-P	Executive Services, Inc.
9725-P	Federal Systems Group, Inc.
Department of the Air Force	
GSBCA No.	**Protester**
9471-P	TBC Corporation
9474-P	Julie Research Laboratories, Inc.
9549-P	Julie Research Laboratories, Inc.
9576-P	Orange Systems
9580-P	Artecon, Inc.
9634-P	Softech, Inc.
9670-P	Data General Service, Inc.
9678-P	Federal Systems Group, Inc.
9715-P	Federal Information Technologies, Inc.
Department of the Army	
GSBCA No.	**Protester**
9447-P	CMP Corporation
9456-P	React Corporation
9482-P	IBIS Corporation
9486-P	Automated Data Management, Inc.
9491-P	Datagraphix
9492-P	Elite Building Services
9559-P	Pansophic Systems, Inc.
9560-P	Pacificorp Capital, Inc.
9597-P	PCA Microsystems, Inc.
9612-P	Grammco Computer Sales, Inc.
9613-P	HSQ Technology, Inc.
9623-P	The Computer Center, Inc.
9641-P	Comdisco, Inc.
9646-P	Federal Systems Group, Inc.
9647-P	Federal Systems Group, Inc.
9649-P	Micro Star Company, Inc.
9651-P	Computerlines
9684-P	AB Computer Consulting
9685-P	Information Builders, Inc.
9692-P	Cyber Digital, Inc.

(continued)

GSBCA No.	Protester
9707-P	The Computer Center, Inc.
9708-P	Comdisco, Inc.
GAO No.	Protester
B-231668.1	Severn Companies, Inc.
B-231668.2	Severn Companies, Inc.
Department of Commerce	
GSBCA No.	**Protester**
9531-P	Babcock and Wilcox d/b/a Power Computing Company
9681-P	Computer Systems & Resources, Inc.
9683-P	Rainbow Technology, Inc.
Department of Defense	
GSBCA No.	**Protester**
9674-P	Wisconsin Physicians Service Insurance Corporation
Defense Communications Agency	
GSBCA No.	**Protester**
9532-P	Fujitsu Imaging Systems of America, Inc.
Defense Mapping Agency	
GSBCA No.	**Protester**
9724-P	Data General Service, Inc.
9727-P	Data General Service, Inc.
Department of Energy	
GSBCA No.	**Protester**
9493-P	Diversified Systems Resources, Ltd.
9577-P	Aspen Technology, Inc.
GAO No.	**Protester**
B-231025.1	Technology & Management Service, Inc.
B-231025.2	Data Monitor Systems, Inc.
B-231025.3	Diversified Systems Resources, Ltd.
B-231025.5	Technology & Management Service, Inc.
B-231025.6	Technology & Management Service, Inc.
Environmental Protection Agency	
GSBCA No.	**Protester**
9475-P	CRC Systems, Inc.
Federal Emergency Management Agency	
GSBCA No.	**Protester**
9600-P	E.D.S. Federal Corporation
9714-P	MCI Telecommunications Corporation
General Accounting Office	
GSBCA No.	**Protester**
9726-P	Consolidated Bell, Inc.

(continued)

General Services Administration	
GSBCA No.	**Protester**
9497-P	Glesby Building Materials Company, Inc.
9700-P	Comdisco, Inc.
9701-P	Finalco, Inc.
9720-P	CRC Systems, Inc.
Government Printing Office	
GSBCA No.	**Protester**
9703-P	International Business Machines Corporation
Department of Health and Human Services	
GSBCA No.	**Protester**
9509-P	Starry Associates, Inc.
9561-P	Government Technology Services, Inc.
9655-P	Federal Systems Group, Inc.
9656-P	Federal Systems Group, Inc.
9687-P	RGI, Inc.
9712-P	Rocky Mountain Trading Company, Systems Division
9717-P	Federal Data Corporation
9719-P	Stellar Computer, Inc.
Department of Housing and Urban Development	
GSBCA No.	**Protester**
9593-P	Systems Engineering & Software, Inc.
Department of the Interior	
GSBCA No.	**Protester**
9567-P	The Computer Center, Inc.
9568-P	Rocky Mountain Trading Company, Systems Division
9652-P	Federal Systems Group, Inc.
9709-P	The Computer Center, Inc.
Department of Justice	
GSBCA No.	**Protester**
9528-P	International Business Machines Corporation
9569-P	Rocky Mountain Trading Company, Systems Division
9627-P	Government Computer Sales
Department of Labor	
GSBCA No.	**Protester**
9548-P	Federal Systems Group, Inc.
National Archives and Records Administration	
GSBCA No.	**Protester**
9699-P	Federal Systems Group, Inc.
National Aeronautics and Space Administration	
GSBCA No.	**Protester**
9516-P	ISYX

(continued)

Department of the Navy	
GSBCA No.	**Protester**
9469-P	TBC Corporation
9550-P	Falcon Systems, Inc.
9551-P	Federal Data Corporation
9594-P	NCR Comten, Inc.
9602-P	ViON Corporation
9605-P	Mitsui Seiki (U.S.A.), Inc.
9625-P	ViON Corporation
9629-P	Kramer Systems International, Inc.
9635-P	Alliant Computer Systems Corporation
9642-P	Federal Data Corporation
9648-P	3C Computer Corporation
9706-P	STM Systems Development Corporation
9718-P	Merrimac Management Institute, Inc.
Office of Personnel Management	
GSBCA No.	**Protester**
9533-P	Compuware Corporation
Securities and Exchange Commission	
GSBCA No.	**Protester**
9448-P	Federal Data Corporation
Department of Transportation	
GSBCA No.	**Protester**
9464-P	Vanguard Technologies Corporation
9508-P	Artais, Inc.
9543-P	MBA Systems Automation, Inc.
9601-P	Hughes Advanced Systems Company
9626-P	Denro, Inc.
9640-P	Wilcox Electric, Inc.
9644-P	Sysorex Information Systems, Inc.
GAO No.	**Protester**
B-231575.1	Norden Service Company, Inc.
B-231575.2	Norden Service Company, Inc.
Department of the Treasury	
GSBCA No.	**Protester**
9487-P	The Chesapeake and Potomac Telephone Company
9636-P	Secure Services Technology, Inc.
9721-P	The Citizens and Southern National Bank
United States Information Agency	
GSBCA No.	**Protester**
9622-P	Public Service Satellite Consortium

(continued)

United States Postal Service	
GSBCA No.	**Protester**
9450-P	APEC Technology Limited
9524-P	Electronic Data Systems Federal Corporation
9525-P	Planning Research Corporation
9610-P	Haugan Industries, Inc.
Department of Veterans Affairs	
GSBCA No.	**Protester**
9465-P	Bernhard Enterprises, Inc.
9479-P	Lanier Business Products, Inc.
9606-P	Ferrell Mortuary, Inc.
9624-P	Ceredo Mortuary Chapel, Inc.
9633-P	Telex Federal Telephony, Inc.
9637-P	North American Automated Systems, Inc.
9682-P	Compuline International, Inc.
9698-P	North American Automated Systems, Inc.
9705-P	Support Systems International, Inc.
9728-P	Telex Federal Telephony, Inc.

Note: Of the 123 cases, 114 were filed with the GSBCA and 9 with GAO.

Appendix II

Thirteen Federal Agencies Where GAO Did Follow-Up Work on ADP Bid Protest Settlements

Department of Agriculture
Department of the Air Force
Department of the Army
Department of Commerce
Defense Communications Agency
Department of Health and Human Services
Department of Housing and Urban Development
Department of the Interior
Department of Justice
Department of Transportation
Department of Veterans Affairs
National Aeronautics and Space Administration
United States Postal Service

Specific Violations of Procurement Laws or Regulations in 17 Protests

(Unless indicated otherwise, violations are for one protest.)

Agency improperly rejected protester's bid as nonresponsive. (two protests)

Agency's amended solicitation did not provide for the minimum 30-day response time.

Agency failed to properly document the need for specific make and model specifications in the solicitation.

Agency terminated a contract improperly by claiming, but not proving, that there were irregularities in the procurement process.

Agency failed to provide advance notice of a contemplated award. (two protests, both of which were later overturned by the United States Court of Appeals on jurisdictional grounds)

Agency decided to proceed with a noncompetitive award with clear knowledge that other companies existed with competency to do the work. (two protests, both of which were later overturned by the United States Court of Appeals on jurisdictional grounds)

Agency waived the proscription against organizational conflicts of interest under different phases of the work. (two protests, both of which were later overturned by the United States Court of Appeals on jurisdictional grounds)

Agency did not make a proper system-life cost analysis and had no valid basis upon which to conclude what was the lowest overall cost alternative.

Agency did not limit the scope of best and final offers.

Agency improperly failed to consider best and final offers in their entireties.

Agency failed to describe the Government's requirements clearly, accurately, and completely in the invitation for bids.

Agency failed to do procurement planning and adequate market research to be able to prepare specifications that reflected its

minimum needs vis-a-vis the commercial availability of products to satisfy those needs.

Agency evaluated proposals on factors not specified in the solicitation. (three protests)

Agency did not promptly notify offerors that their proposals had been rejected.

Agency failed to include a specific list of salient characteristics in invitation for bids that would be required for brand name or equal features.

Agency did not properly conduct discussions with offerors.

Agency failed to obtain a delegation of authority from the Administrator of the General Services Administration to conduct the procurement.

Note: There were 20 violations in the 17 protests. Some violations occurred in more than 1 protest and some protests had more than 1 violation; therefore the number of violations will not total 20. Two protest decisions were overturned by the United States Court of Appeals. These two protests contained more than one violation.

Comments From the General Services Administration Board of Contract Appeals and Our Responses

Note: GAO comments supplementing those in the report text appear at the end of this appendix.

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

November 8, 1989

Milton J. Socolar
Special Assistant to the Comptroller General
General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548

Subject: Analysis of report on ADP bid protests

Dear Mr. Socolar:

Enclosed is our analysis of GAO's report on ADP Bid Protests. The report on which we are commenting has been improved substantially since the draft that we saw previously. Nevertheless, we still have concerns about the contents and appreciate the opportunity to express them to you. Your willingness to afford us this opportunity, and also to revise the earlier version, indicates to us a desire on your part to produce a careful and balanced report.

Our analysis is organized into two parts. First, we have certain fundamental concerns about the approach taken in the report and have discussed those at some length. Second, we have listed, page by page, specific items in the report that we find to be problematic.

As you will see, we disagree with the basic approach taken in some areas of the report, as well as with portions of the discussion. For this reason, we request that you include this letter and all of our analysis as an appendix to the report.

Sincerely,

LEONARD J. SUCHANEK
Chairman and Chief Judge

See comments 1 and 2.

Text revised.

Now on pp. 30 and 31.

See comments 1 and 9.

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

ANALYSIS OF GAO REPORT ON ADP BID PROTESTS 1/

I. Introduction

This analysis is organized into two sections: (1) a discussion of fundamental concerns that we have with the approach taken in the report and (2) a page by page listing of specific items in the report that we find problematic. In addition, the first section contains two parts, each of which addresses a separate concern. First, we believe that the report reflects a misunderstanding of the role played by settlements in the litigation process, as well as the manner in which settlements occur. Second, we have serious misgivings about the report's discussion of suspensions of procurement authority as they occur in Board proceedings. The report expressly declines to reach any conclusions regarding agencies' partisan complaints about the suspension process and undertakes no meaningful examination of that process. In fact, the issue appears to fall outside the scope of the subcommittee's request. Nevertheless, approximately fifteen of the report's sixty-one pages of text, including most of the conclusion section at 54-57, are devoted to questioning the wisdom of the Board's suspension authority. The report's discussion relies entirely on biased, unsupported agency comments that are in fact contradicted by other data in the report. The report makes little or no attempt to incorporate or even acknowledge the purposes that Congress sought to serve by establishing the suspension procedure, and the authors did not seek the Board's input on these issues during the draft's preparation. As a result of this unbalanced treatment, we believe that the objectivity and intentions of the report's authors are open to question.

II. Fundamental Concerns

A. The Settlement Process

In our view, the report exhibits a fundamental misunderstanding of the workings and purpose of the settlement process. The authors of the report appear to view settlements as being somehow suspicious and the payment of any money by the Government pursuant to a settlement agreement as being per se inappropriate. In addition, the report reflects confusion over the roles of the tribunal and of the parties in the settlement process. In particular, the report fails to place primary responsibility for settlements where it properly belongs--with the parties.

1/ The Board received the report on October 26, 1989.

See comments 3 and 5.

Text deleted.

Now on pp. 22-24.

See comment 4.

Now on pp. 22 and 26.

See comment 5.

Text deleted.

Now on p. 31.

See comment 6.

The report's misapprehensions begin with its definition of "Fedmail." The report defines the term as a situation where, due to the time involved in defending protests, agencies "prefer to settle rather than defend their actions, by paying protesters money to withdraw their protests." Report at 9. Under this definition, Fedmail might occur almost any time the Government chooses to settle any lawsuit of any type. Nearly every day, the Government settles cases such as contract, tax and tort suits based on a judgment that defending those suits is not worthwhile. Presumably, the trouble and expense involved in litigation plays a role in these settlements; if litigation were painless, there would be little reason to settle. Yet, we do not believe that such settlements can properly be considered Fedmail. Instead, any definition of the term should focus on the existence, if any, of abusive aspects to the settlement. A settlement should not be termed Fedmail unless it cannot be justified by the litigation hazards.

The report's overbroad definition of Fedmail appears to have led the authors to the view that settlements should be viewed with suspicion. For instance, the report, at 36, queries "why settlements are common and why agencies settle many protests." This query leads to a discussion, at 37-40, the point of which appears to be that the fact that agencies settle frequently somehow shows that the protest process is stacked against them.

We reach precisely the opposite conclusion from the data in the report. Settlements are common, and encouraged, in virtually all types of litigation. In fact, we view it as an important part of a judge's duties--whether at the Board, in federal court or elsewhere--to attempt to facilitate agreements by the parties to resolve their differences short of adjudication. In our view, the protest process at the Board, with its short time frames, forces the parties to organize their cases quickly and confront their strengths and weaknesses early on. The fact that settlements are common shows that the Board's procedures work well. These considerations, however, receive no mention in the report's discussion of the suspension process. Instead, the report appears to be slanted so as to create the impression that the Board's procedures are not working.

We find even more puzzling the report's treatment of payments made by the Government pursuant to some of the settlement agreements. The report takes the view that these settlements occurred, not because of the agencies' perception of litigation hazards, but because of some flaw in the Board's procedures. For instance, the report states, at 37, that the payments were made "primarily because the agency wanted to avoid operational delays," the inference being that the agencies did not settle due to legitimate litigation hazards. In addition, the report repeatedly refers to these payments as "payments to protesters," again implying that the settlements represented some sort of blackmail rather than legitimate compromises of cases where agencies were potentially liable for protest and proposal costs. The report then concludes with the ominous statements that "we were unable to identify how pervasive 'Fedmail' is," at 54, and "our review did not show a high incidence of 'Fedmail,'" at 55. The report thus appears to us to be slanted so as to create the impression that a Fedmail problem does indeed exist, even though the report expressly acknowledges an inability to prove it.

Now on p. 25.

Now on pp. 24 and 25.

See comment 7.

In our view, the report's own data proves otherwise. The "payments to protesters" listed by the draft, at 44, with one exception, required an average payment by the Government of $28,173. This figure is entirely consistent with the figures given by the report, at 42, for cost awards in cases where protesters seek protest and proposal costs. We would conclude from these numbers that the "payments to protesters" on which the report seeks to cast so much suspicion represent cases where the agencies settled on the basis of the likely cost awards in the event protesters prevailed. We find nothing suspicious about such settlements.

See comments 1 and 2.

Furthermore, the report consistently fails to place responsibility for these settlements where it belongs: with the agencies. Only a party to a lawsuit can properly appreciate the hazards that the litigation poses to its own needs. If, in fact, agencies are settling protests based upon inappropriate considerations, the responsibility for correcting the problem lies with those charged with oversight of the expenditure of federal funds, such as GAO. For instance, it is our experience that, when a Government agency considers compromising a lawsuit, somebody, usually the trial attorney, will draft a memorandum explaining the hazards of the litigation and the Government's likely exposure or recovery. Only an offer in line with the risks should be accepted. There is no indication in the report, however, that the authors requested or examined any documentation underlying any of the agencies' settlement decisions. We would expect such documentation to be far more indicative of the true reasons for, and advisability of, a settlement than the after-the-fact musings of an anonymous agency official who may or may not have been intimately involved in the litigation and who, in any case, will have unique opinions based on his or her status as a litigant. Because the report relies solely on these parochial statements, its discussion of the reasons agencies settle is highly suspect. We find it difficult not to conclude that the authors failed to seek more useful information because the biased comments they received fell in line with their own preconceived conclusions.

See comment 8.

Now on p. 13.

We also note that the possibility of an agency settling a lawsuit for inappropriate reasons is not confined to bid protests. An agency might, for instance, settle a tort suit or a suit alleging damages for violations of constitutional rights (a "Bivens suit") to avoid adverse trial publicity that might have an adverse impact on the agency's image at appropriations time. Such risks will occur whenever the Government is subject to suit. Nevertheless, the report unjustifiably assumes, at 21, that a prospective vendor would not seek Fedmail in the federal courts. To the contrary, a preliminary injunction is a much bigger stick than a Board suspension. The former, once obtained, is likely to last many months, or even a year or more, thus forcing the agency to settle on whatever terms it can get. A Board-ordered suspension, on the other hand, can last only forty-five days at the most. A protester with a reasonably good case thus would have more leverage in federal court. The report, however, in its apparent desire to cast doubt on the Board's procedures, misses the point by focusing on the tribunal rather than on the need for proper oversight of agency decision-making.

See comment 9.

The report's failure to place responsibility for entering into settlements where it belongs has yet another facet. The report repeatedly refers, with

Now on pp. 22-24 and 28-31.

Now on p. 32.

apparent disapproval, at 37, 38, 42, 51, and 52, to settlements that are not "disclosed to," or "reviewed" or "authorized" by, the Board. In doing so, the report implies that the Board's procedures somehow lend themselves to abuses of the public trust. The report then concludes, at 57, that Congress should require agencies to disclose to the tribunal the terms of settlements of Board and GAO proceedings.

In reaching this conclusion, the report once again misunderstands the settlement process. Those of us at the Board who have litigated in federal court have found that the court ordinarily is not informed of the terms of a settlement, not even in cases involving the Federal Government. This fact illustrates the basic principle that tribunals, whether the federal courts or executive tribunals, are not the appropriate bodies to oversee agency settlement practices. This responsibility lies with bodies such as GAO that are officially charged with oversight authority. To put it simply, if GAO believes that protest settlements need to be examined, it should ask the agencies for the agreements and for the underlying documentation.

See comment 20.

Furthermore, GAO's recommendation regarding disclosure, if adopted, might discourage settlements in some cases. For instance, an agency might not want the terms of a settlement publicly disclosed for fear of provoking other protests. In addition, the report presents no convincing argument or evidence that disclosure of settlement agreements would curb any potential abuse.

See comment 11.

The report's misapprehensions extend to its discussion of the permanent indefinite judgment fund. The report concludes that confusion exists over the question whether agencies must reimburse the fund for cost payments resulting from their procurements and over whether the Board may require them to do so. The report adds, at 61, that GAO has ceased taking action to require reimbursement in cases where the Board has ordered it "until the reimbursement matter [is] resolved."

Text deleted.

Text deleted.

See comment 11.

Text deleted.

Now on p. 33.

See comment 12.

The report misconstrues the state of the law in this area. The report does correctly state, at 60, that the Federal Circuit dismissed the Government's appeal from the Board's decision in the Julie Research case because it did not present a justiciable controversy. The report fails to mention, however, that the Government, in addition to appealing the Board's decision, requested a writ of mandamus, whereby the Federal Circuit would have directly ordered the Board to vacate its reimbursement order. By dismissing the appeal, the Federal Circuit implicitly denied this request. There is thus little likelihood of the appellate court reviewing any decision in which the Board requires an agency to reimburse the judgment fund. In addition, the report's suggestion, at 60, that the issue remains unresolved in part because one judge dissented from the Board's decision in Julie Research is simply foolish. It hardly bears stating that a decision does not need to be unanimous to be valid. Finally, we note that the report itself acknowledges, at 59, that the Federal Acquisition Regulation requires that costs be paid out of agency funds, a requirement that GAO apparently is ignoring. Thus, contrary to the report's assertion, the law is clear that the Board may, in appropriate cases, order an agency to reimburse the judgment fund for protest and proposal costs paid as a result of the agency's ADPE procurement activities.

See comment 13.

Incidentally, we find it highly disturbing that GAO is not carrying out its responsibility to facilitate enforcement of valid Board orders. The possibility that the Federal Circuit may eventually overrule the Board on this issue, however likely or unlikely that may be, does not render invalid existing Board decisions. By declining to take steps to ensure that agencies reimburse the fund as ordered, GAO is failing to carry out what should be a routine, ministerial function. If in fact agencies are entering into unjustified settlements because of the availability of the judgment fund, the fault lies with GAO. In decisions such as Julie Research, the Board has endeavored to carry out its mandate to require conformance with the procurement laws. Our effectiveness in doing so, however, is compromised by actions such as GAO's that seek to undermine the Board's authority.

See comment 14.

The report also misunderstands the procedures involved in cost settlements at the Board. The report states that in two settlements, "the agency paid the protesters directly, as part of a settlement agreement, without GSBCA review and authorization." This statement is misleading because it implies that some sort of authorization is needed or at least advisable. The Board has previously stated that the parties to a protest are free to settle disputes of costs issues by arranging for payment as they see fit, without involvement of the Board. Furthermore, the Board will dismiss protests on joint motions without further inquiry. This approach is entirely consistent with the Federal Circuit's decision in Federal Data Corp. v. SMS Data Products Group, 819 F.2d 277 (Fed. Cir. 1987), and with FAR 33.105(f). Where the parties wish a Board award so that they can obtain payment from the permanent indefinite judgment fund, however, the Board retains its discretion under 41 U.S.C. § 759(f)(5)(C) to determine whether costs are appropriate and in what amount. Systemhouse Federal Systems, Inc., GSBCA No. 9446-C(9313-P), 89-2 BCA ¶ 21,773, at 109,551, 1989 BPD ¶ 118, at 2-3. The report does not accurately reflect Board precedent in this regard.

B. The Suspension Process

See comment 1.

Text deleted.

Text revised.

Now on p. 31.

The single most baffling aspect of the report is its extensive discussion of the Board's power to suspend an agency's procurement authority pending the outcome of a protest. Greater space is given to a discussion of the wisdom of Board suspensions than to any other issue. This is true in spite of the report's repeated disavowal of any attempt to examine the suspension process in a meaningful manner. For instance, the report states, at 4, that "its review was not designed to review agency assertions that urgent and compelling circumstances should have allowed protested procurements to proceed," and that "GAO did not attempt to determine if the Board was incorrect in denying agency requests for urgent and compelling decisions or if the agencies acquiesced too easily in the instances where they paid protesters money to settle." See also report at 55. Nevertheless, the report, at 54-57, expresses concern that the protest process may have "gone awry" and concludes that further inquiry is needed.

See comment 2.

One aspect of the report that is particularly disturbing is its reliance for its half-articulated conclusions solely upon the musings of thirteen

anonymous agency officials. The authors apparently accepted at face value the assertions of these disgruntled litigants, without any attempt to determine whether their complaints had merit. The report does not even acknowledge the possibility that the views of one party to a litigation may be less than objective. Instead, it continually repeats those views as if they were not open to question.

See comment 2.

Even worse, the report makes little or no attempt to present the other side of the issue. Although the authors apparently intervieved representatives of some protesters, the report makes almost no mention of their perceptions of the need for the suspension process. This imbalance does little to enhance the credibility of the report or the objectivity of its authors.

The report's unbalanced treatment extends to its failure to accord any meaningful weight to Congress' purposes in enacting the Board's protest jurisdiction. The legislative history of the Competition in Contracting Act of 1984 (CICA) shows that Congress believed that GAO's then-existing protest process provided neither an adequate remedy to bidders nor an adequate check on agency procurement practices. Among the patent failings of GAO's protest process, Congress cited the lack of fact-finding and discovery at GAO, the slowness of GAO's procedures, and GAO's tendency to accept agencies' assertions unquestioningly. Congress also noted constitutional difficulties associated with an arm of the legislature regulating executive agencies. H.R. Rep. No. 98-1157, 98th Cong., 2d Sess. 23-27 (1984).

See comment 15.

In addition to the above considerations, Congress was particularly troubled by the lack of an effective procedure at GAO for suspending a procurement while a protest was pending. The House Report noted one case in which GAO found that an Army procurement had been conducted illegally. The Army nevertheless installed the awardee's equipment and, after a delay of five months, convinced GAO that it was in the "best interests" of the Government to deny any relief to the wronged bidder. The Report quotes Mr. A.G.W. Biddle, the president of the Computer and Communications Industry Association, who stated that such cases

> point out a cardinal failing of [the GAO] bid protest process. GAO has no power to stop a contract award or contract performance while a protest is pending. As a result, agencies usually proceed with their contracts, knowing that they will preclude any possibility of relief simply by delaying the protest process.

Id. at 24 (emphasis added). Although these congressional findings are clear and unequivocal, the report gives them, at best, passing mention, and affords far greater weight to the parochial comments of agency officials.

The report also fails altogether to mention Congress' intent and findings, in the Paperwork Reduction Reauthorization Act of 1986, which established permanent protest jurisdiction at the Board after less than two years of the three-year experimental period for which CICA provided. Congress found that, during the first twenty-one months in which it heard protests, the Board had

See comment 15.

"lived up to, and surpassed, the expectations expressed when the determination was made to grant it protest jurisdiction." H.R. Conf. Rep. No. 1005, 99th Cong., 2d Sess. 774 (1986). The Conference Report went on to note that the Board was well equipped to resolve protests in a timely manner and to "avoid disrupting legitimate procurements" and "interrupting contract performance." Id. The Report added that the Board was able to provide meaningful discovery while resolving protests in an average of approximately twenty working days. The Report thus concluded that, "[w]ith the Board, vendor[s] are far better assured that the Federal procurement system has treated them fairly and honestly, . . . while agencies are better able to reap the benefits of competition." Id. at 774-75. Although the report, at 17, notes that the above Act made the Board's protest jurisdiction permanent, it makes no mention of Congress' reasons for doing so. This omission is particularly objectionable in light of the fact that the report, in direct contradiction to these congressional findings, contains numerous assertions and half-conclusions that the Board's protest procedures place too great a burden on the procurement process.

Now on p. 11.

Still another disturbing aspect of the report's "examination" of the Board's procedures is the absence of any meaningful discussion of the mechanisms by which the Board attempts to reduce the impact of suspensions on the agencies. The report, at 30, does recognize that in some cases the Board will order only partial suspension, and it notes that the Board has allowed agencies to continue evaluating proposals during the pendency of a protest. A more telling example is the fact that Board suspension orders have allowed agencies to procure equipment and/or services on a temporary basis during the protest so as to strike a balance between the rights of the protester and the needs of the agency. Such arrangements are often worked out between the parties, with the assistance of the judge, if needed, at the pre-hearing conference, which is typically held within two to four days after the filing of the protest. The report also affords no weight to the Board's ability to dismiss protests as frivolous or untimely. In fact, judges at the Board have held accelerated hearings on limited issues where there has been a possibility that a protest might be subject to dismissal. Judges at the Board attempt to identify such issues at the pre-hearing conference so as to dispose of the litigation as early as possible. Had the authors of the report requested comments from the Board during their investigation, we could have made clear that the Board employs a variety of mechanisms to expedite protests for the benefit of the agencies even beyond the forty-five day statutory mandate.

Now on pp. 18-19.

See comment 15.

The most glaring omission of all is the report's explicit failure to conduct any examination into the legitimacy of assertions by unidentified agency officials that the Board interprets too strictly the "urgent and compelling" standard set by Congress. The authors failed to examine the circumstances of even a single case, nor did they include the views of any protesters on this issue. The only "evidence" they cite in support of the views of agency officials is the assertion, at 36, that "agencies were generally not very successful" in contesting suspensions. Even this assertion is highly questionable, given that it is based on only seven cases, of which the agencies lost only four. Report at 31. In light of the authors' studied

See comments 1, 2, and 15.

Text deleted.

avoidance of any information that might have contradicted the parochial views of disappointed litigants, we cannot help but question their motives in mentioning those views at all, much less in doing so repeatedly and unquestioningly. Such an unbalanced treatment is not consistent with recognized GAO standards, nor is it worthy of inclusion in a GAO report.

Now on p. 19.

See comment 15.

Not only does the report fail to afford a balanced treatment to the questions it endeavors so hard to raise concerning the suspension process, it actually contains data showing that that process is working quite well, although the significance of this data goes unrecognized by the authors. The report states, at 30, that the average suspension lasted less than twenty-five working days. Significantly, however, the authors make no attempt to analyze the impact of these suspensions on the procurement process. We strongly suspect that twenty-five days is insignificant in light of the time typically consumed by an ADPE procurement. On the other hand, without suspensions, many bidders with meritorious claims would be denied effective relief. The brief duration of suspensions, together with the fact that all but one of the settlements involving monetary payments call for amounts that appear to approximate legitimate protest and proposal costs rather than blackmail, compels the conclusion that the suspension process does not force agencies into unwarranted monetary settlements. In fact, even in the one seemingly abusive settlement involving the Census Bureau, GAO's own report, which served as the impetus for this report, concluded that the "cash settlement could have been avoided if the Bureau had not initially created its own management dilemma by failing to plan properly for and manage the minicomputer procurement." Decennial Census, Minicomputer Procurement Delays and Bid Protests: Effects on the 1990 Census, at 3 (GAO/GGD-88-70, June 14, 1988). This conclusion goes unmentioned in the report. We are at a loss to understand why the report's authors were more impressed by complaints of agency officials than by their own data or by GAO's own prior report.

Now on p. 27.

Text deleted.

Now on p. 21.

Aside from ignoring their own data, the report's authors give short shrift to studies done by the President's Council on Management Improvement and the President's Council on Integrity and Efficiency. The report notes, at 46, that both were unable to conclude that suspensions impact unfavorably on the procurement process. Nevertheless, the report, at 54, affords more weight to "the perception of . . . press articles" in concluding that further examination is needed. It does so in spite of its own conclusion, at 28-29, that these press articles grossly overstate the amount of time it takes to resolve protests. The conclusion is inescapable that the report's authors were pursuing their own agenda in crediting speculation over hard facts.

Now on p. 12.

See comment 16.

The failure of the report's authors to examine the suspension process in a meaningful manner leads to a further error when they compare suspensions to preliminary injunctions. The report implies, at 19-20 and 56, that the standards applicable to requests for injunctions are preferable to those applicable to suspensions. This comparison is highly inappropriate for two reasons. First, the impact of an injunction is far greater than that of a suspension. Federal court litigation is far more time-consuming than litigation before the Board; federal courts do not operate under a statutory,

Text deleted.

See comment 17.

Now on p. 9.

See comment 18.

Text deleted.

See comment 18.

forty-five day time limit, and instead often take years to resolve cases. Congress structured the suspension procedure to impose a much smaller burden on an agency's procurement process, a fact that goes unmentioned in the report. Second, an injunction differs fundamentally in nature from a suspension. The reason that an injunction is considered an "extraordinary" remedy, report at 20, is that the sanction for a violation is criminal conviction for contempt of court. For this reason, the courts have traditionally been reluctant to order such relief. A suspension involves no such drastic sanctions and, thus, is not analogous.

The authors further err in stating repeatedly that the protest process affords "unprecedented" remedies to litigants. This statement is incorrect. As the report itself notes, at 12-13, protesters could previously have gone to district or claims court, where they would have had available discovery uninhibited by the Board's time constraints and injunctive powers more extensive and effective, in terms of the available sanctions, than any powers possessed by the Board. The distinguishing features of Board protests are the expedited schedule, which benefits agencies more than protesters, and the more informal setting, which reduces the costs and burdens of litigation for both parties. The report's authors ignore these factors, as they do so many others, in their "examination" of the suspension process.

The report's comparison of GAO's experience with suspensions to that of the Board is equally flawed. As an initial note, any point for point comparison of GAO's suspension authority to that of the Board is inherently problematic because of the constitutional doctrine of separation of powers. GAO's suspension authority is structured so as to avoid conflict with that doctrine by allowing agencies to overturn suspensions. The Board, as an executive tribunal, may operate without such limitations.

The comparison is further flawed by the report's incomplete examination of GAO's experience. The report concludes, at 50, that agencies overturned GAO suspensions "infrequent[ly]" because they did so in seventy-six out of 609 cases. We consider 12.5% to be a very high ratio in this context, because it means that the affected protesters will, in all likelihood, be denied effective relief in the event they prevail. More meaningful would have been an examination of the consequences of those seventy-six agency decisions. Furthermore, we note that while the report's authors were quite satisfied to dwell on the remarks of disappointed litigants who appeared before the Board, they apparently did not ask the protesters in those seventy-six cases whether they believed they had received fair treatment. We also would be interested to know whether the likelihood of an agency overturning a GAO suspension increases as the dollar value and visibility of the procurement increases. Most of the protests at the Board involve high-dollar procurements that are very important to the procuring agencies. We expect that an agency would be much more likely to find its own version of urgent and compelling circumstances in such a procurement. We also would not be surprised to learn that, as a result of their experiences before the Board, agencies generally have become more sensitive to the importance of complying with the procurement laws and of

treating bidders fairly. 2/ This experience may make them more reluctant to run roughshod over protesters at GAO.

See comments 1 and 2.

In summary, we believe that the report's discussion of the Board's suspension process is seriously flawed and unbalanced. The authors repeatedly emphasize the biased views of disappointed litigants while ignoring, or refusing to seek, any information that might contradict those views. They compound these errors by couching much of the report in inferences and half-conclusions in an apparent attempt to create the impression, without actually so stating, that the Board's protest process has "gone awry." We are left with the distinct impression that the authors were motivated more by institutional bias than by a desire to present an objective report, a bias that may have been intensified by the report's observation, at 25, that 114 of 123 ADPE protests were filed at the Board rather than GAO. In light of our comments, we urge that the report be thoroughly reworked with a view toward presenting a more balanced treatment with better supported conclusions.

Now on p. 15.

III. Specific Errors and Misleading Statements

The report contains a number of statements that we believe are erroneous or misleading. What follows is a list of those statements and our comments thereon, to the extent that they are not covered in the above discussion.

Now on p. 8.

Pages 10-11, runover ¶

See comments 19 and 25.

-- The report's definition of "protest" is incomplete. The report fails to mention the fact that delivery orders under various types of schedule contracts may be protested. This omission causes a serious error in the report's data, as explained below.

Now on p. 8.

Page 11, first full ¶

See comment 20.

-- The report states that one way in which protests may be dismissed is upon "the protester's request." The Board ordinarily will not dismiss a protest solely upon the protester's request, but instead will generally ascertain whether the agency has any objections. This is important because agencies have objected where protesters unilaterally requested dismissal without prejudice, a form of dismissal that permits a protest to be refiled at a later date.

Now on p. 9.

Page 13, first full ¶

See comment 21.

-- The report misstates Congress' purpose, in the Federal Courts Improvement Act of 1982, in codifying the Scanvell doctrine. According to the report,

2/ At least one author has reached just this conclusion. In Gabig, "A Primer of Federal Information Systems Acquisitions," 17 Publ. Contr. L.J. 31 (1987), the author states, "The ominous threat of a GSBCA protest has had a prophylactic impact on the acquisition process. Federal agencies have become more conscientious about properly conducting procurements for information systems." Id. at 43-44.

Congress reasoned that prospective contractors should be able to challenge illegal agency procurement actions because of an implied contract arising from the solicitation. In actuality, the rationale underlying the Claims Court's review of procurement actions, as it then existed, was much broader. In enacting the portions of the Act discussed in the draft, Congress stated that it did not intend to alter the existing substantive law as embodied in Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970). S. Rep. No. 97-180, 97th Cong., 2d Sess. 23, reprinted in 1982 U.S. Code Cong. & Admin. News 11, 33. The Scanwell decision was not based on an implied contract theory; instead, the court simply held that a prospective contractor had standing to challenge illegal agency procurement actions. Id.

Now on p. 11.

Page 16, third ¶, to pages 16-17, runover ¶

See comment 22.

-- The report should point out that the Board will not order suspension unless an interested party makes a timely request for one. Rule 19(a)(2). As it stands, the report implies that suspension is automatic unless the agency requests a hearing.

Now on pp. 11-12.

Page 18, first sentence

See comment 23.

-- The report incorrectly states that "the standard for suspending a protested procurement is the same both at GAO and the GSBCA." In actuality, the standard at GAO is different in post-award protests: the agency may override the suspension if it finds urgent and compelling circumstances or if the best interests of the United States will not permit awaiting a decision. In pre-award GAO protests and in all Board protests, both factors must be satisfied.

Now on p. 12.

Page 18, second ¶

See comment 24.

-- The report states that "[a] party protesting a Brooks Act ADP procurement may elect to protest to the GSBCA or GAO." This statement is true, but incomplete. In actuality, the party may also protest to the agency, or file suit in district or claims court.

Now on p. 15.

Page 26

-- The report contains two serious errors in its calculation of the number of procurement actions that could potentially have been protested during the period at issue. The result of these errors is that the proportion of "protestable" procurements that actually resulted in protests is far smaller than the report estimates.

See comment 25.

-- The report erroneously fails to include "procurement actions that obligated a total of $295 million from the General Services Administration's ADP schedules during this period." In actuality, such actions can and have been protested. Thus, the report's total of 2,475 potentially "protestable" actions should be increased by approximately 4,600.

-- In stating that 107 out of 2,475 procurements resulted in protests, the report is comparing apples and oranges. The number of protests, i.e., 107, includes protests that were dismissed for lack of jurisdiction because the procurements were not subject to the Brooks Act. Some fell under the Warner Amendment and others were not ADPE procurements. The number of "protestable" procurements, i.e., 2,475, does not include Warner Amendment or non-ADPE procurements. Thus, the report either should exclude all non-Brooks Act protests or include all non-Brooks Act procurements in determining the percentage of procurements that resulted in protests.

See comment 26.

Now on pp. 17, 18, and 20.

Page 28, Table and page 29, Table

-- Although we have not had time to review them thoroughly, the tables appear to contain inaccuracies.

-- According to Table 2.3, only one protest was dismissed because of a protest pending in another forum. This appears to be incorrect. The nine ADPE protests filed at GAO that are referenced in the report appear to have involved three procurements, two receiving two protests each, and the other receiving five. Although our information is incomplete, it appears that, of these nine protests, at least three and possibly seven were dismissed because of other protests pending at the Board. In addition, the remaining two appear to have been denied on the basis of a Board decision in a protest over the same procurement filed by a different protester. Therefore, more protests were dismissed because of other protests pending than the table indicates.

See comment 27.

-- We are unable to determine how Table 2.2 treats these duplicative protests. In our opinion, if a protester files the same protest at GAO and the Board, and one of these filings is dismissed due to the pendency of the other, it should be counted as one protest.

See comment 23.

-- We believe that the report, in the interest of candor, should expressly point out that all or most of the nine ADPE protests filed at GAO during the period in question were actually resolved at the Board.

See comment 29.

Now on p. 28.

Page 38, runover portion of ¶ at top

-- This paragraph contains two serious misstatements.

-- The report states that "[t]he GSBCA believes that suspensions are needed to provide remedies to protesters and that even if procurements are delayed the full 45 days allowed by CICA to reach a decision, the delay is insignificant in view of the time it typically takes the government to complete ADP procurements." This statement is another example of the slanted presentation that is pervasive throughout the report. The suspension procedure is not a matter of

Text revised.

See comment 30.

the Board's "belief." Rather, Congress has provided for it because Congress believes that it strikes the proper balance between the rights of vendors and the needs of agencies. In fact, Congress expressly so found in making the Board's protest jurisdiction permanent. The Board itself takes no position on such issues, but instead merely endeavors to comply with the intentions of Congress. We have already pointed out much of this in our discussion of the legislative histories of CICA and the Paperwork Reduction Reauthorization Act, but it bears repeating because of the obvious bias in this particular, highly misleading statement.

-- The report states that "GSBCA's interpretation of a 1987 court ruling on one settlement precludes it from inquiring into the terms of settlements." This statement is simply wrong. (The same error is repeated at page 51, second paragraph.)

See comment 14.
Now on pp. 22 and 28-29.

Page 59, runover portion of ¶ at top

Now on p. 33.

-- The report incorrectly implies that CICA and the Contract Disputes Act of 1978 (CDA) have the same provisions with respect to payment of awards out of the judgment fund and differ only in that CICA does not expressly require reimbursement. In actuality, CICA affords the Board discretion in authorizing payments out of the fund, while the CDA does not. The latter provides that "[a]ny monetary award to a contractor by an agency board of contract appeals shall be paid promptly in accordance with the procedures [provided by section 1304 of Title 31 (which establishes the judgment fund)]." 41 U.S.C. § 612(b) (emphasis added). CICA, on the other hand, provides that the Board "may, in accordance with section 1304 of Title 31, . . . declare an appropriate interested party to be entitled to" protest and proposal costs. 40 U.S.C. § 759(f)(5)(C) (emphasis added). CICA thus does not contain the mandatory language of the CDA.

See comment 31.

Page 61, last ¶

Now on p. 34.

-- The report's recommendation that protest costs awards "authorized" by GAO be made payable from the judgment fund is misleading. Most likely, GAO awards are not payable from the judgment fund currently because of concerns about separation of powers. GAO's awards are actually only recommendations that agencies may decline to follow. If GAO could, of its own authority, require payments from the judgment fund, this would at least arguably constitute an unconstitutional intrusion into the authority of the executive branch, particularly if agencies were required to reimburse the fund. The report should, at the very least, acknowledge and discuss this issue.

Text revised.

See comment 32.

Following are GAO's comments on the General Services Administration Board of Contract Appeals' letter dated November 8, 1989.

GAO Comments

The GSBCA primarily addressed two concerns with the report: (1) its belief that GAO considers bid protest settlements to be suspicious or improper and (2) the extent to which we discussed the GSBCA's authority to suspend protested procurements, which the GSBCA termed the single most baffling aspect of the report.

Our response to specific statements by the GSBCA regarding the report follow.

Extent of GAO's Inquiry

1. In several areas of the report the GSBCA questioned the extent to which we discussed suspensions and sought information necessary to respond to the congressional request. With respect to the question of whether agencies settle protests to avoid procurement suspensions, the GSBCA said that we relied on unsupported agency comments and did not seek the Board's views during the report's preparation.

In response to the comment on the extent we discussed suspensions, we deleted some of the text in that area. However, as page 8 of the report points out, we were asked to determine if agencies settle protests to avoid procurement suspensions (Fedmail as defined by the press) and whether settlements should be publicly disclosed or approved. To respond to this congressional request, we sought to determine the reasons why bid protests have been settled, and we examined and described the suspension process because it is the purported cause of Fedmail. The GSBCA's reaction appears to stem primarily from the nature of our inquiry and agency accounts of why they settled bid protests. Also, we have not examined how well the suspension process is working and offer no opinion regarding whether agency perceptions of GSBCA suspension proceedings are accurate.

Further, in response to the comment on the extent we sought information to respond to the request, on pages 13 to 14 and 23 to 25 we point out that we reviewed settlement agreements and agency files supporting those agreements, interviewed the attorneys or contracting officers in the relevant agencies, and interviewed the protesters or their attorneys. We also discussed these matters at the outset of our work with the Chairman and the Chief Counsel of the Board, shared an early draft

with the Board, asked for a meeting to discuss it, and invited formal written comments on the final draft report.

2. The GSBCA said it was disturbing that GAO relied solely upon the "musings" of 13 anonymous agency officials to support its conclusions on the suspension process.

As we point out on page 27, we interviewed 33 procurement officials and attorneys in 13 agencies. These were the people responsible for handling the bid protest settlements that we reviewed. Second, we reviewed the settlement agreements for those protests and agency supporting files that detailed reasons for the decisions. We interviewed the protesters or their attorneys for each protest that was settled and included their views on pages 28 to 30 of our report. Third, as pointed out on page 14, we also interviewed GSBCA officials, GSA officials, trade association officials, and officials from two study groups established by Presidential Councils that looked into Fedmail.

Settlements in General

3. The GSBCA generally asserted that we view settlements and payments to protesters as improper, and that, in some way, our definition of Fedmail that evidence of this.

As pointed out on pages 8 and 25, we used the same definition of Fedmail as was used in press reports. As defined by the press, Fedmail occurs when an agency pays a protester to withdraw its bid protest in order to avoid suspension of the protested procurement until a decision is rendered.

4. The GSBCA said that the fact that settlements are common shows that the Board's procedures work well, which we do not mention in the report.

We did not review how well the Board's procedures work, and are unable to draw a conclusion that they work well based upon the number of bid protests settled. For example, the number of settlements may not reflect satisfaction with procedures but other factors, such as the agency's desire to proceed with the procurement.

5. The GSBCA said that our report implies that the settlement payments made to protesters represented some sort of blackmail rather than legitimate compromises of cases where the agencies were potentially liable for protest and bid preparation costs.

We sought to determine if agencies settle protests to avoid suspension of the procurements. In the report where we discuss agency payments (pages 24 to 26) we gave the reasons the agencies settled. For example, in our discussion of the 12 undisclosed settlements on page 24 we noted that agencies settled 7 because they wanted to avoid costly and lengthy litigation. We also noted that in 5 of these 12 cases, the agency also recognized procurement errors. Also, in our discussion of the nine monetary settlements (page 26) agencies settled six primarily because they wanted to avoid procurement and litigation delays. In two of the nine cases the agencies recognized procurement errors.

6. The GSBCA said our report appears to be slanted to create the impression that a Fedmail problem exists, even though the report expressly acknowledges an inability to prove it.

We did not say that a Fedmail problem exists. Our review did not show a high incidence of it. Nevertheless, we point out that although we identified only four undisclosed Fedmail settlements, there could be more, as our review covered only the second half of fiscal year 1988, those settlements that the GSBCA suggested we look into, and undisclosed settlements of the 13 agencies where we did follow-up work.

7. The GSBCA said that since, with one exception, the average payment to protesters was consistent with cost awards where protesters seek protest and bid preparation costs, the agencies must have actually settled on the basis of the likely cost award in the event protesters prevailed.

We disagree with the GSBCA's calculations. For example, the average payment to the protesters, not including the large Census Bureau case, was $44,254, and the average cost award where protesters seek protest and bid preparation costs is $19,632, or less than half the amount of the average payment. Also, as discussed in the report, agencies gave reasons different from those hypothesized by the GSBCA for settling with cash payments.

8. The GSBCA said that our report unjustifiably assumes that a prospective vendor would not seek Fedmail in the federal courts.

We have revised the report by removing a section that may have led to such an assumption.

Disclosure of Settlements

9. The GSBCA said that federal courts or executive tribunals are not the appropriate bodies to oversee agency settlement practices, and that if GAO believes settlements need to be examined, it should ask the agencies for the agreements and for the underlying documentation.

The GSBCA failed to distinguish between disclosure and approval of settlements. On pages 28 to 30 we made this distinction and concluded on pages 30 and 31 that disclosure would assist Congress in monitoring the costs of settlements, but that we do not believe that settlements should have to be approved by the GSBCA or GAO.

10. The GSBCA said that our recommendation regarding disclosure might discourage settlements and was not supported by convincing argument or evidence that it would curb any potential abuse.

We disagree. The majority of agency officials agreed that settlement terms should be disclosed. However, most of them were against having settlements approved. At a minimum, disclosure would help identify abusive settlements and would dispel suspicions that the press and the public have about settlements.

Source of Settlement Funds

11. The GSBCA said that contrary to our report's assertion, the law is clear that the Board may order an agency to reimburse the Judgment Fund for costs paid.

The appellate court, in the case cited by the Board, explicitly chose not to decide the matter. We also disagree with the GSBCA's contention that it is unlikely that the issue could be reviewed again. It could arise in any case in which an agency is ordered by the Board to reimburse the Judgment Fund. The issue of whether agencies may be required to reimburse the Judgment Fund is not clear. It can be resolved by the courts under the facts just discussed, or Congress can address it legislatively. As discussed on page 34, we believe that all protest cost awards should be borne by agency appropriations.

12. The GSBCA noted that the Federal Acquisition Regulation requires costs of Board awards of protest and bid preparation costs to be paid out of agency funds, and stated that we have ignored this requirement in concluding that the law is unclear.

As pointed out on page 33, while CICA requires that GSBCA payments be made from the Judgment Fund, the Federal Acquisition Regulation provides that these payments must be made from the agency's funds available for the acquisition of supplies or services. The Federal Acquisition Regulation is inconsistent with CICA in this regard.

13. The GSBCA said that it was disturbed that GAO is not facilitating enforcement of Board orders by providing information to the Treasury Department to enable collection of Judgment Fund reimbursements.

The portion of our report that the GSBCA referred to has been deleted.

14. The GSBCA said that we were wrong in our statement that the Board's interpretation of a 1987 court ruling precludes it from inquiring into the terms of settlements and that our report misunderstands the procedures involved in cost settlements at the Board.

The GSBCA cited a case in which, at the request of both parties, it determined whether a settlement amount was proper for payment out of the Judgment Fund after the Board found a statutory or regulatory violation. GSBCA No. 9446-C (9313-P), 89-2 BCA 21,773.

We added language to page 29 of our report to clarify that the GSBCA will not inquire into a settlement reached in advance of the Board's determination of the merits of the protest except when both parties request an award payable out of the Judgment Fund.

Importance of Suspensions

15. Apparently viewing our report as criticism of the suspension provisions of CICA, the GSBCA said that we gave insufficient recognition of congressional intent in establishing suspension procedures, cited legislative history of CICA supporting suspensions, and argued that, without suspensions, many bidders would be denied effective relief. In this connection, the GSBCA cited a number of ways in which it seeks to reduce the impact of suspensions on agencies.

We made no effort to assess how well the suspension provisions of CICA have worked, whether some modifications might be warranted, or how effective the GSBCA has been in reducing the impact of suspensions.

16. The GSBCA said our report implies that the standards applicable to injunctions are preferable to those applicable to suspensions.

We did not make such an implication. On page 12, we reported as relevant to our inquiry that the CICA standard makes it easier for a protester to obtain a suspension than to obtain an injunction in court because the protester does not carry the burden of proof and because the courts weigh a number of factors before providing relief.

17. The GSBCA said that our report errs in stating that CICA's bid protest process affords unprecedented remedies to litigants.

We deleted the referred section. However, as stated in response number 16, the CICA standard makes it easier for a protester to obtain a suspension than to obtain an injunction in the courts.

18. The GSBCA said that our report's comparison of GAO's experience with suspension to that of the Board is flawed.

We deleted some detailed information in this section of the report to improve readability of the report and remove GAO-GSBCA comparisons that were not relevant to our recommendations.

Miscellaneous Issues

19. The GSBCA said that our definition of a protest is incomplete because we did not include delivery orders under various types of schedule contracts.

We deleted some detailed background information, including the referred section, to improve readability of the report. Also, as shown in response number 25, we noted the number of schedule procurement actions in our report and emphasized that less than one-half of 1 percent of the actions were protested during the second half of fiscal year 1988.

20. The GSBCA pointed out that the Board will ordinarily not dismiss a protest solely upon a protester's request.

We revised the report on page 8 to take into account the fact that the GSBCA asks the agency involved if it has any objections to dismissal.

21. The GSBCA said that in establishing the bid protest jurisdiction of the Claims Court the Congress codified the law embodied in the Scanwell case. Consequently, according to the GSBCA, we are mistaken in our view that the Claims Court's bid protest authority stemmed from the view that before contract award there is an implied contract between the United States and bidders that bids will be fully and fairly considered.

GSBCA is in error. The jurisdiction of the Claims Court and its predecessor, the Court of Claims, to hear bid protests arose from the rationale that an implied contract is created by the solicitation of bids. This can be clearly seen in the language of the Federal Courts Improvement Act of 1982, in which Congress described the Claims Court's authority to hear bid protests as authority to consider a "contract claim" brought before contract award. 28 U.S.C. 1491(a)(3)(1982).

22. The GSBCA said our report should point out that the Board will not order suspensions unless an interested party makes a timely request for one.

Our report did point this out on page 11.

23. The GSBCA said that our report did not properly distinguish pre-award protest standards for GAO protests from post-award standards.

We clarified page 12 as suggested by the Board.

24. The GSBCA said that our report was incomplete because we did not mention protests with the agencies or the courts.

On page 9, we pointed out that there are other forums.

25. The GSBCA said that our report seriously erred in failing to include the 4,600 purchases from ADP schedule contracts in addition to the 2,475 contracts awarded by federal agencies in calculating the number of procurement actions that could be protested.

The number of ADP schedule procurement actions supports our point that few ADP procurements are protested. We noted the number of such actions in the report. Of the 123 protests filed during the second half of fiscal year 1988, only 11 were of ADP schedule purchases. This is less than one-half of 1 percent of the 4,600 schedule actions.

26. The GSBCA said that we should either exclude all non-Brooks Act protests or include all non-Brooks Act procurements in determining the percentage of procurements that resulted in protests.

We did not exclude non-Brooks Act procurements because they can be protested at GAO. Further, the Federal Procurement Data System's database does not segregate Warner Amendment (weapons systems) ADP

procurements. We believe our estimate of the percentage of procurements that were protested represents a reasonable figure, based on information that is readily available.

27. The GSBCA said that of the nine GAO protests in table 2.3, at least three and possibly seven were dismissed because of other protests pending at the Board.

Of the nine GAO protests two were dismissed because the agency took corrective action; one was dismissed because of concurrent (GSBCA) jurisdiction; one was dismissed for untimely filing; one was withdrawn; one was declined to be reinstated; one was dismissed because of a lack of jurisdiction (already decided at GSBCA); one was dismissed because the protester was not prejudiced; and one was dismissed because some issues were untimely, and others had been decided by the GSBCA.

28. The GSBCA said it was unable to determine how table 2.2 treated duplicate protests.

We counted all protests filed. A procurement protested at both GAO and GSBCA was counted as two protests.

29. The GSBCA said that all or most of the nine GAO protests were resolved at the Board.

Four of the nine GAO protests were resolved at GAO.

30. The GSBCA said that we slanted its position on the effect of delaying procurements.

We deleted the referred section, but on page 8 of its comments, the GSBCA reiterated its position by stating that it strongly suspects that 25 days is insignificant in light of the time typically consumed by an ADP procurement.

31. The GSBCA said that our report incorrectly implies that the Contract Disputes Act and CICA relating to Board awards are the same except that CICA does not expressly require agencies to reimburse the Judgment Fund for awards paid from the Fund. The GSBCA pointed out that CICA provides that the Board may determine that a party is entitled to costs payable out of the Judgment Fund, and the Contract Disputes Act provides that any monetary award "shall be paid promptly" in accordance with Judgment Fund procedures.

We agree that the two statutes differ in several respects, and our report does not imply otherwise. We disagree with the Board's apparent assertion that because CICA provides that it "may" award costs payable from the Judgment Fund the Board may also order costs to be paid from other public funds.

32. The GSBCA said that our report should acknowledge that our recommendation regarding protest costs authorized by GAO be made payable from the Judgment Fund could constitute an unconstitutional intrusion into executive branch authority.

We revised our recommendations to require that all costs, whether authorized by GAO or GSBCA, be borne by agency appropriations because such costs are generally much smaller in amount than those paid under the Contract Disputes Act.

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